APPENDIX A

Opinion of Mr. Justice Silverman Dated September 5, 1963 Striking Defense of Illegality Under the Sherman Act (42 Misc. 2d 939)

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., Plaintiff, *v.* AMERICAN MFRS. MUTUAL INSURANCE Co. et al., Doing Business under the Name of KEMPER INSURANCE COMPANIES, et al., Defendant.

Supreme Court, Special Term,
New York County, September 5, 1963

SAMUEL J. SILVERMAN, J. This is an action for breach of a contract by which defendants insurance companies by their agent defendant Clinton E. Frank, Inc. undertook to "sponsor" certain television programs entitled "ABC Evening Report" on plaintiff's television network and to pay plaintiff an agreed price therefor. At the end of the program of November 9, 1962, plaintiff caused to be broadcast a "promotional announcement" of a program conducted by Howard K. Smith, a television news commmentator, entitled "The Political Obituary of Richard M. Nixon". The Howard K. Smith program was broadcast on November 11, 1962, and one of the participants in the program was Alger Hiss, who had been convicted of perjury in a *cause célèbre* of our time. The appearance by Hiss on this program aroused considerable controversy. On November 14, 1962, defendants cancelled their sponsorship of the ABC Evening Report.

The first cause of action in the complaint is for the agreed unpaid price for the November 9 program. The second cause of action is for the breach with respect to programs after November 14.

Plaintiff has made motions under former rules 109 and 103 of the Rules of Civil Practice addressed to the answer,

as well as a motion for summary judgment under former rule 113 of the Rules of Civil Practice. These motions are disposed of as follows:

The sponsorship contract of August 15, 1962 between the parties is a binding bilateral contract for sufficient consideration. Accordingly, the first, second and third defenses in the answer are insufficient.

The promotional announcement of the Howard K. Smith show at the end of the ABC Evening Report was not a breach of either any express or any implied provisions of the contract. It was not a "commercial" or a "billboard" within the meaning of paragraph 11, nor an advertisement of a product or service competitive to defendants. The contract was not one for a sale of time but rather for advertising through sponsorship of the program. Furthermore, paragraph 8 of the contract provides that "one minute of program airtime must be lost before time charge credit will be issued." The promotional announcement of the Howard K. Smith show was a matter of a few seconds. The parties are apparently in agreement that under the custom of the industry the sponsorship of a quarter-hour program by an advertiser does not preclude a promotional announcement of this kind at the end of the sponsored show, which is what happened here. Accordingly, the fourth and fifth defenses and the first and second counterclaims based on the promotional announcement must fail.

The sixth defense in the answer is that the contract is unenforcible because in violation of the Sherman Act (U. S. Code, tit. 15, §1), and is part of a program of re-

straint of trade in violation of the Sherman Act. Among other things, the contract is attacked as an illegal tie-in sale whereby defendants were required to sponsor the show on 35 stations they did not want in order to get the sponsorship on 95 stations that defendants did want.

As to the first cause of action for the recovery of the agreed consideration for the broadcast of November 9, 1962, on which defendants' sponsorship was announced, and which took place before defendants' repudiation of the contract, it seems clear that the defense of violation of the Sherman Act is insufficient. I think the case is indistinguishable from the goods sold and delivered cases, in which the United States Supreme Court has held a defense of violation of the Sherman Act insufficient (*Kelly* v. *Kosuga,* 358 U. S. 516 [1959]; *Bruce's Juices* v. *American Can Co.,* 330 U. S. 743 [1947]).

I hold the sixth defense also insufficient as to the second cause of action in the complaint, the action for breach of contract insofar as it relates to programs after November 9, and after the repudiation.

The latest test that the United States Supreme Court has stated is whether giving the judgment asked by plaintiff "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act" (*Kelly* v. *Kosuga, supra,* p. 520). Unfortunately, this test is not unambiguous as applied to the facts of the present case. To grant plaintiff the judgment it asks with respect to the second cause of action would indeed require defendants to pay for broadcasts over some 35 stations which defendants say they do not want and

which they say they were compelled to contract for as part of an illegal tying-in program by plaintiff. But in that respect, the situation seems not much different from *Bruce's Juices* v. *American Can Co.* (330 U. S. 743, *supra*) in which recovery of agreed purchase price was allowed even though it included the claimed discriminatory overcharge. On its face the contract is a perfectly valid one for sponsorship of the program on 130 stations. Any network contract must have some provisions as to what stations the program is to be carried on. On its face this is not a contract having for its very object one of the restraints forbidden by the Sherman Act; it is not a contract to fix prices, or to divide territories between competitors, etc.

The United States Supreme Court has said: "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court" (*Kelly* v. *Kosuga*, 358 U. S. 316, 518, *supra*). To allow it would be to create "a very strange class of private attorneys general" (*ibid.*, p. 520).

To allow the defense would involve that same quality of capriciousness that the Supreme Court found in *Bruce's Juices* v. *American Can Co.* (*supra*, p. 753) as the penalty, would not be proportioned to the injury, but rather to other factors having nothing to do with the policies of the antitrust laws, e.g., whether credit was extended or not, and how much; how many stations defendants wanted, and how many stations defendants did not want; at what point in the life of contract defendants chose to assert its illegality; how much of the contract was performed and how much still remained to be performed etc.

Appendix A

Although a contract may so violate the antitrust laws as to be unenforcible in the State courts (*General Aniline & Film Corp.* v. *Bayer Co.*, 305 N. Y. 479, 484-485 [1953]), to disallow the defense would be consistent with the policy that enforcement of the Federal antitrust laws should in general be in the Federal courts only (*Mayer Bros. Poultry Farms* v. *Meltzer*, 274 App. Div. 169, 178 [1st Dept., 1948]). This consideration is particularly apropos where as here defendants are actually pressing a suit in the Federal court for relief under the antitrust laws. In that suit defendants, if entitled to it, can get full relief, bearing a rational relationship to the damage if any that they may have suffered. Incidentally, in that same suit defendants seek an injunction against the prosecution of the present suit. There is also an obvious advantage in not litigating these long drawn out and expensive antitrust questions in two courts. And while a decision by the Federal court can finally resolve the antitrust questions between the parties, the decision by the State court of these antitrust questions would probably not be binding on the Federal court (cf. *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184, 188 [C. A. 2d, 1955]).

The first partial defense in mitigation of damages is to the effect that plaintiff could have minimized its damages by negotiating other sponsorship and commercial announcement programs for the programs as to which defendants repudiated. This defense appears to be a valid one, but it goes, of course, only to the amount of damages.

If, as defendants allege in their second partial defense, the parties in substance agreed to a partial cancellation

of the contract for the balance of November and all of December 1962, that agreement would seem to be supported by mutual consideration in that each party was relieved of its obligations for that period. And such an agreement, being executed, is not invalidated by section 33-c of the Personal Property Law (*Velveray Corp.* v. *Jolo Plastics Corp.*, 19 A D 2d 69, 71 [1st Dept., 1963]). Accordingly, the second partial defense is sufficient on its face, and the affidavits present a triable issue of fact as to whether the alleged agreement was in fact made. This issue of fact does not go only to the question of amount of damages, but substantially affects the issue of breach. Even if this breach relates only to part of the contract, it is inseparable from the rest of the contract in such sense that judgment could not be given on the portion of the second cause of action relating to the period after December, 1962 separately from the judgment for the period before. As to the second cause of action, it is not "possible to divide the claims or cause of action so that an effective judgment can be rendered as to part, without mutilation of the whole" (see *Lowe* v. *Lowe,* 265 N. Y. 197, 203 [1934]).

As defendant Clinton E. Frank, Inc. acted only as agent for a disclosed principal, it is not liable on the contract.

Accordingly, the first, second, third, fourth, fifth and sixth defenses are stricken as insufficient under former subdivision 6 of rule 109 of the Rules of Civil Practice and subdivision (b) of 3211 of the Civil Practice Law and Rules. The motion to strike the first and second partial defenses is denied. The first and second counterclaims are

dismissed under former subdivision 5 of rule 109 of the Rules of Civil Practice and paragraph 7 of subdivision (a) of 3211 Civil Practice Law and Rules.

Summary judgment is granted in favor of plaintiff against all defendants except defendant Clinton E. Frank, Inc., as to the first cause of action, and plaintiff's motion for summary judgment is denied as to the second cause of action. Summary judgment is granted dismissing the complaint as to defendant Clinton E. Frank, Inc.

The motion to strike portions of the answer under former rule 103 of the Rules of Civil Practice is denied except that subparagraphs 8(a) through 8(f) and paragraph 87 of the answer are stricken.

Settle order on notice.

There appears to be no occasion for leave to amend. But if defendants desire to amend they may request leave on the settlement of the order, stating the proposed amendment, and setting forth evidence to show the defendants had good ground to support the proposed amendment as described in the last sentence of subdivision (e) of 3211 Civil Practice Law and Rules.

APPENDIX B

Opinion of Mr. Justice Geller Dated March 12, 1965 Solely on the Issue of Damages (48 Misc. 2d 397)

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. Plaintiff, *v.* AMERICAN MFRS. MUTUAL INSURANCE Co. et al., Defendants.

Supreme Court, Special and Trial Term, New York County, March 12, 1965.

ABRAHAM N. GELLER, J. This is an action for breach of a sponsorship contract brought by plaintiff, herein referred to as "ABC", against defendant insurance companies, collectively known as the Kemper Insurance Companies and herein referred to as "Kemper."

On August 15, 1962 the parties entered into a television network contract whereby Kemper agreed to sponsor one program per week of the ABC Evening Report news program over a 26-week period beginning October 17, 1962. On November 9, 1962, the fourth telecast under Kemper's contract, a "promotional announcement" was made at the end of the sponsored program and just before the scheduled time was up, regarding the Howard K. Smith program on November 11 entitled "The Political Obituary of Richard M. Nixon," evidently occasioned by his recent defeat in the contest for the California governorship. Alger Hiss appeared on that program and attacked Richard M. Nixon. This caused considerable public controversy.

Protesting the appearance of Hiss on the ABC-TV Network and, in particular, the promotional announcement at the close of its sponsored Evening Report program and referring to the numerous complaints received from its agents and policyholders, Kemper cancelled its participat-

ing sponsorship of Evening Report by telephone on November 13, 1962 and letter on November 14, 1962. ABC replied that same day that it intended to hold Kemper "fully responsible for any and all sums due and to become due to us under the terms of the agreement between us dated August 15, 1962."

On November 14, about the time of the exchange of these letters delivered by hand, Mr. Herbert Brownell, of counsel for Kemper, discussed the matter with James C. Hagerty, vice-president of ABC News, and suggested that he call James S. Kemper, Chairman of the Board of Kemper, a personal friend for many years, to see if they could work out "a reasonable solution of this whole problem." Mr. Hagerty then suggested, and Mr. Brownell agreed, that it would be advisable to have Thomas W. Moore, then vice-president of ABC in charge of its television network and now president of the network, join him in talking with Mr. Kemper over the telephone.

The nature and effect of the subsequent conversation with Mr. Kemper and of the ensuing conversations and acts of the parties will be more fully developed in the consideration of Kemper's second defense, interposed originally as a partial defense claiming that, as a result of these subsequent arrangements, Kemper was under no obligation for the seven programs from November 13, 1962 to December 31, 1962, and amended at the trial to assert it as a complete defense to ABC's claim for the entire remaining 22 weeks of the contract.

In that November 14 telephone conversation Mr. Moore proposed what the parties have characterized as a "hia-

tus'' during which there would be no Kemper commercials on Evening Report, with Kemper resuming its sponsorship thereafter. Mr. Kemper stated that he would submit the offer to his board for their consideration. Kemper claims that in a later talk on November 30, 1962 between Mr. Hagerty and Mr. Kemper, when Mr. Hagerty was inquiring as to what the board had decided and was informed that the board would not meet until shortly after the first of the year, there was an understanding and interpretation to the effect that Kemper was not to be obligated for the seven weeks of the ''hiatus'' period between November 13, 1962 and December 31, 1962. On January 4, 1963 Mr. Kemper advised Mr. Hagerty in effect that the board had decided against ''coming back on the program.''

ABC sued on January 9, 1963. Its first cause of action was for the unpaid amount of $19,818.43 due pursuant to the contract for the November 9, 1962 broadcast. Its second cause of action was for damages in the sum of $432,693.22 for Kemper's cancellation and breach ''on or about November 14, 1962'' of the sponsorship agreement. Kemper interposed an answer containing six complete defenses, two partial defenses, and two counterclaims.

ABC's motion to strike out the answer and for summary judgment was granted as to the first cause of action; all six complete defenses were stricken and the two counterclaims were dismissed as insufficient, the court noting with regard to the promotional announcement that it was in accordance with the custom of the industry; but held that there was a triable issue of fact as to whether the parties had made the alleged agreement asserted in the second partial defense as effectuating Kemper's nonlia-

bility for programs broadcast in the period from November 13, 1962 to December 31, 1962; and that the first partial defense merely asserted a claim for mitigation of damages (*American Broadcasting-Paramount Theatres, Inc.* v. *American Mfrs. Mut. Ins. Co.*, 42 Misc 2d 939, affd. 20 A D 2d 890).

The trial before this court thus dealt with the issue of the second partial defense and the question of ABC's damages for breach of the sponsorship contract. The court granted Kemper's trial motion to amend its pleading to assert that defense as a complete defense on the alleged ground that, by electing to sue exclusively on the basis of the original November 14, 1962 cancellation, which, according to Kemper, had been eliminated by the hiatus agreement, ABC had purportedly debarred itself from recovering even for the remaining 15 weeks of Kemper's sponsorship period between January 1, 1963 and April 12, 1963.

The court finds that no agreement of any kind was made during the so-called "hiatus" period but that there was merely an outstanding offer by ABC which was not accepted by Kemper. Furthermore, even assuming that there was a "hiatus agreement," it would have been at best only an executory accord, not a substitute or superseding agreement, and ABC would have had the choice upon nonperformance thereof to sue either on the accord or on the original obligation.

There was not a word of writing between the parties regarding the "hiatus." The agreement of August 15, 1962, it should be noted, provided that it shall remain as their understanding and agreement "until superseded or

amended by some other written document or documents signed by both parties."

In the telephone conversation of November 14, 1962 following Mr. Brownell's talk with Mr. Hagerty, Mr. Kemper complained of the great pressure Kemper was under from its agents and policyholders. Mr. Moore then suggested that Mr. Kemper reconsider his position regarding cancellation and permit the pressure to subside by taking a period of time during which there would be no Kemper commercials and then resume sponsorship. This proposal, although it would entail a substantial loss to ABC in view of the obvious difficulty in arranging for any sponsorship replacement in the brief time available during this off-season period, was made by ABC in an attempt to settle the dispute and avoid litigation.

Mr. Kemper testified that he replied: "If that's what you are offering, a hiatus, to put the thing on ice for the time being, I will see that it is promptly considered by our board." The "hiatus" has been referred to as a "cooling-off period" or "gap" or "interruption" in Kemper's sponsorship to permit the situation to "simmer down."

It is clear from the testimony of Moore and Hagerty that, although it was not explicitly stated in that form, the resumption of sponsorship after the hiatus period was intended to be for the entire unfulfilled period of Kemper's contract, i.e., 22 weeks, which, had ABC's offer been accepted, would then have run from the expiration of the hiatus period to a new termination date extending for a like period of time beyond the contract expiration date of April 12, 1963.

Kemper does not seriously dispute this view of the November 14 telephone conversation but contends that, in a subsequent meeting on November 30, 1962 between Mr. Kemper and Mr. Hagerty, the agreement set forth in Kemper's second partial defense was reached. It is there alleged that, in consideration of Kemper's undertaking to reconsider its decision not to sponsor any further programs, ABC agreed that Kemper would not be charged for the seven "Evening Report" programs for the balance of 1962 and Kemper "agreed to notify ABC shortly after January 1, 1963 whether Kemper would or would not sponsor the remaining 15 programs."

The November 30 meeting, upon which Kemper relies, does not support its contention that an agreement was reached, no less the agreement claimed by it. Mr. Hagerty told Mr. Kemper that he had come merely to ask when the board was meeting on the hiatus question and, when other questions were raised, stated that he knew nothing about "legal fields" and had no authority to talk about them. Mr. Kemper testified that during that meeting he said to Mr. Hagerty: "I assume that during this period our mutual obligations are waived or put on ice." It is on the account of that meeting given by James S. Kemper, Jr., that Kemper bases its claim. But his testimony indicates that there was no new or different understanding, merely an attempted clarification by his father of the November 14 telephone conversation. He testified: "My father said, 'Well, first of all, about this hiatus that you fellows have proposed, is it definitely understood that under no circumstances are we to be responsible for sponsoring the pro-

gram during the hiatus.'" Mr. Hagerty said: "That's right." Mr. Kemper continued: "That was my understanding of the telephone conversation that I had with you and what's his name the other day, and I wanted to make certain I understood this correctly." Mr. Hagerty's final words were: "You understand, if something can't be worked out here, this will go over to the legal people and I will be out of the picture completely."

It is obvious that Mr. Hagerty's "That's right" as to Kemper not being responsible during the hiatus period meant no more than that, since there were no Kemper commercials during the hiatus, it would not be held responsible while the offer was being held open. Not a single word suggestive of release or forgiveness of sponsorship obligation for 7 of the remaining 22 programs, or, indeed, of any programs was mentioned on this or any other occasion, nor was there anything said at any time that ABC's offer was to have Kemper resume for "15" weeks only. The only discussion was as to whether Kemper would resume or go back on the program, which, of course, could only mean for the remaining unfulfilled period of the contract. There was no reason for ABC to give up the substantial sum represented by seven program sponsorships, well over $100,000, particularly since it had made the hiatus offer only after Kemper's counsel had suggested a friendly call from Mr. Hagerty, and even that offer involved a considerable loss to it.

Kemper has the burden of establishing its claim that there was a release or forgiveness of its obligation for seven weekly programs. Unless there is explicit language

showing such an understanding by the parties, it will not be implied from one ambiguous statement. A release of an obligation must be clearly and unequivocally expressed and understood as something being given up by an obligee. It simply does not make sense that, by a play upon words but without a direct word on the subject, ABC can be deemed to have agreed to give up outright its claim for 7 out of 22 programs in exchange for Kemper's mere promise to reconsider whether it would resume for 15 programs.

Actually, all during the hiatus period ABC's offer remained outstanding. On January 3, 1963 the Kemper board rejected ABC's offer. No agreement of any kind had been reached after the cancellation to change Kemper's obligations under its contract. The attempted accord never came into existence, even as an executory accord, since ABC's tender had not been accepted by Kemper (see *Petterson* v. *Pattberg*, 248 N. Y. 86, 88-89).

But, even if the board had accepted the offer, that would have been only an executory accord, defined as an agreement embodying a promise to accept at some future time a stipulated performance in satisfaction of a present claim or obligation and a corresponding promise to render such performance in satisfaction of such claim or obligation (General Obligations Law, §15-501, subd. 1, derived from Personal Property Law, §33-a, subd. 1). And, then, if Kemper had subsequently failed to perform the accord according to its terms, ABC would have had the choice of suing on the accord or the original obligation (General Obligations Law, §15-501, subd. 3, derived from Personal Property Law, §33-a, subd. 3).

Appendix B

Kemper endeavors to build up on the flimsy foundation of these exploratory talks a theory of a subsequent agreement on November 30 superseding the original contract obligation. It is true that, where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement (*Blair & Co.* v. *Otto V.*, 5 A D 2d 276). But, if the intention of the parties, expressed by their conduct or words, is merely that the subsequent agreement provide for a future performance to be accepted as future satisfaction of an old obligation, such agreement is an executory accord, full performance of which alone extinguishes the old obligation. In the absence of a clear showing warranting a finding of superseder or substitution: "It is generally more reasonable to suppose that [a creditor] bound himself to surrender his old rights only when the new contract of accord was performed" (6 Williston, Contracts [Rev. ed.], §1847). In *Goldbard* v. *Empire State Mut. Ins. Co.* (5 A D 2d 230) the court held that there was nothing in the series of informal conversations to suggest the finality, deliberateness or occasional formalization associated with substituted agreements and the specific intention to discharge pre-existing obligations.

This review of the facts and the law makes clear ABC's right to sue on the basis of Kemper's November 14, 1962 cancellation, its damages being computable for the remaining contract period from November 14, 1962 to April 12, 1963. It merely withheld that suit until Kemper's board

refused its offer of an executory accord. The second partial defense, amended to be asserted as a complete defense, is accordingly dismissed on the merits.

The contract provided that Kemper pay a fixed sum for "program cost" and for "networking charge," which for the 22 Kemper play dates amounts to $119,350, plus "time charges" for station lineups, a classified rate for each station and a formula being set forth to compute the time charges to be paid to ABC by Kemper. The stations listed include five owned and operated by ABC itself and over 100 independent but affiliated stations. ABC had an affiliation agreement with these independent stations, which contained a formula for computing the amount of station compensation payment to be made by ABC when such station was in the lineup telecasting a sponsored ABC program. ABC retained the difference between the time charges paid by Kemper and the station compensation payments may by ABC. The total time charges which would have been payable by Kemper on the basis of the lineup clearing "Evening Report" on its 22 play dates amounted to $318,225.58.

Thus the total contract price for these 22 play dates, had Kemper complied with the contract, would have been $437,575.58. This figure is not substantially disputed.

"Evening Report" was a continuous program and ABC saved nothing in program costs or networking charges as the result of Kemper's cancellation of its participating sponsorship. ABC also had the right to sue for the total time charges provided for in Kemper's contract, even though it was required to pay a substantial portion thereof to the affiliated stations. Since Kemper's payment of these

total time charges was to be made to ABC in the first instance, it is not even necessary to invoke the authority of the provision in CPLR 1004, formerly section 210 of the Civil Practice Act, permitting a suit by or against a person "with whom or in whose name a contract has been made for the benefit of another" without joining the person for or against whose interest the action is brought.

However, when the court pointed out that Kemper would then be entitled to be credited with selloffs of any of Kemper's 22 play dates not only by ABC but also by the affiliated stations through local sales (immediately upon cancellation, on November 15, 1962, ABC had released for local sales by affiliated stations the "commercial positions formerly occupied by Kemper" subject to recapture only if ABC obtained network sponsorship for any such dates), ABC withdrew that portion of its claim represented by the station compensation payments which would have been payable to the affiliated stations had Kemper complied with the contract. ABC did not withdraw that part of its claim represented by the station compensation payable to its five owned and operated stations, properly crediting Kemper with local selloffs made by these five stations. Kemper's objection to the inclusion in this group of station WXYZ, Detroit, on the ground that it is a separate corporate entity, is misplaced. Not only is it actually a division of plaintiff distinguishable only in its corporate setup from the other four owned and operated stations, but ABC always had the right to include in its suit amounts represented by station compensation, provided only that it gave credit for local selloffs by such station.

Appendix B

Kemper disputes ABC's computation of the amount of the affiliated station compensation payments being withdrawn and deducted by ABC from its claim. It should be noted that, in the interest of facilitating the trial, the court directed ABC to permit inspection of all relevant records for the purpose of verification of its accounting procedures and computations by Kemper's attorneys and accountants. ABC's computation of the affiliated station compensation payments to be deducted is $135,864.33, Kemper's $147,177.56. The court finds that Kemper's method of computation fails to take into account the approximate 20 hours of free time per month granted to ABC by the affiliation agreement. The computation has to be made as if Kemper had complied with the contract, not as if Kemper were subsequently adding to the payments actually made. The free time must be allocated in equal proportions among all the sponsored programs of the month to determine the portion of the monthly payment allocable to each program. Kemper's method would give it an advantage, even though it had broken the contract, merely because payment had already been made by all other sponsors who carried out their contracts. Deducting from the contract price of $437,575.58 the sum of $135,864.33, representing the withdrawn claim for the affiliated station compensation that would have been made for Kemper's 22 play dates, leaves a net contract price claim of $301,711.25.

However, ABC claims that there should be added the sum of $23,572.73, which is the amount of station compensation payments it contends it is obligated to pay, by reason of Kemper's cancellation, to the affiliated stations under a

28-day notice provision in the affiliation agreement. Strangely, enough, there is no provision referring to sponsorship cancellation as such, and the parties argue the applicability of two diverse provisions. ABC relies on a provision requiring that it give at least 28 days' advance notice of the "discontinuance of any scheduled series of network commercial programs," failing which it agrees to pay station compensation as if such series had continued for 28 days. Kemper claims the applicability here of a provision that ABC is not obligated to pay anything to an affiliate for the unsponsored portions of a program series agreed to be carried in its entirety by the station.

Although ABC maintains that it has been ABC's "policy" to pay affiliates under the 28-day notice provision where an affiliate requests such compensation for cancellation of a commercial sponsorship, it has not paid the only two affiliates who made such a request in this case. That provision by its terms is applicable only where a program series is discontinued. The reason for the provision apparently is that, without such advance notice, the affiliated stations would be involved in the problem and expense of hasty arrangements to provide a replacement program in addition to trying to get a sponsor. The provision does not apply where the series is continued by ABC despite the cancellation by one participating sponsor. The affiliates may then obtain compensation by means of local sales of the time made available by the cancellation without any program costs to themselves, as was here provided for by ABC's notification to the affiliates on November 15, 1962. If the 28-day provision were held to be applicable in this

situation, the affiliates would obtain station compensation from ABC as well as the proceeds of local sales for continuing ABC programs. The court holds that ABC is not obligated under this provision to its affiliates because of Kemper's cancellation, and that portion of the claim is not allowed.

The final step in the computation of damages is to determine the amount to be credited or deducted from the net contract price claim—i.e., whether it should be the proceeds realized by ABC in the actual selloffs of some of the 55 commercial minutes of Kemper's 22 cancelled play dates (as claimed by ABC) or the purportedly realizable value of all the 55 minutes (as claimed by Kemper). Kemper had 2½ minutes of commercial time per program.

The general rule of damages applicable to a breach of contract for the sale of goods is contract price less market value, the loss to a seller being the difference between the price he was to receive and the value of the goods, less any expense he saves. While the law imposes upon the party injured by a breach of contract the active duty of making reasonable exertions to render the injury as light as possible, the burden of proving that the damages sustained could have been prevented rests upon the party guilty of the breach (*Hamilton* v. *McPherson,* 28 N. Y. 72; *Losei Realty Corp.* v. *City of New York,* 254 N. Y. 41).

However, market value is not always the measure of recovery—as, for example, where there is no market for the type of goods involved, or where it is a contract for personal services, or where the subject matter of the contract is perishable. In such situations the damages are meas-

ured by the difference between contract price and cost of performance, on the principle that such sellers are entitled to the damages they have actually sustained by the breach of contract (5 Williston, Contracts [Rev. ed.], §1379).

Advertising contracts have been held to fall into the latter category, so that upon wrongful withdrawal by an advertiser the publisher is entitled to recover the contract price, reduced, as though the contract was one for services, by such amount as was or could have been obtained in the exercise of reasonable efforts to minimize damages by the use of that space for other advertisements (*Ware Bros. Co.* v. *Cortland Cart & Carriage Co.*, 192 N. Y. 439). A sponsorship contract is a purchase of the privilege of identification as sponsor of a broadcast program for the purpose of advertising its products (*Columbia Broadcasting System* v. *Amana Refrigeration*, 295 F 2d 375). Its essential characteristic is that it is a form of advertising, and damages for a breach thereof should be governed by the rule applicable to advertising contracts generally. Moreover, the subject matter—commercial minutes or time—is perishable, since, if not sold in time, it has vanished and is of no value to anyone. Furthermore, there has been no showing that there is a market or market value for commercial television minutes in the same sense as there is a market and market value for goods and commodities.

The rule, then, here applicable measures ABC's damages on the basis of reasonable efforts to sell off Kemper's available 55 minutes, reducing its net contract price claim by the proceeds realized from such sales as it could reasonably effect and not by the alleged market value of the entire

55 minutes. To keep the subject in perspective, it should be pointed out that the price in Kemper's contract dated August 15, 1962 amounted to about $7,500 net per commercial minute (after deducting 15% agency commission); that ABC's selloffs of 13½ of the 55 minutes were at an average net price of $4,080 per minute; and that Kemper's assumed market value, pursuant to a theory based on comparative audience ratings, is for the period here involved $5,100 net per minute, not far removed from ABC's selloffs.

The court determines that ABC made reasonable efforts, in light of the existent circumstances and consistent with its regular business practice, to sell off the available Kemper 55 minutes. On the day following the cancellation it notified all stations, including its five owned and operated stations, that they could proceed with local sales of such minutes, subject to ABC's obtaining full network sponsorship for any of these minutes; and, by withdrawing the portion of the claim allocable to the affiliated stations and giving credit for local sales effected by its five owned and operated stations, it has given Kemper the benefit of all local sales. Within a few days after the cancellation it notified its sales staff to sell these 55 minutes at an offering price of Kemper's $7,500 net per minute as a starting point for negotiations, which, could it have been realized, would have resulted in recoupment of Kemper's contract price.

The period from November to April is off-season for the procurement of television sponsorship. The major contracts are negotiated months before the Fall season, which commences about the latter part of September. In fact, ABC was unable to consummate any direct sales of

Appendix B

Kemper minutes but only as parts of "package" contracts, in which a sponsor purchases for a lump sum minutes in several different programs and, on occasions, is given a certain number of minutes on a no-charge basis or as a "bonus." In these package sales ABC sold 6½ Kemper minutes at an average price per minute of $4,080; and 7 Kemper minutes at no charge, but these have likewise been credited to Kemper at the aforementioned average price of $4,080.

Consideration of the reasonableness of ABC's efforts and realizations in the selloffs of Kemper's cancelled 55 minutes, in light of the situation then prevailing, should include a comparative study of ABC's sales during this period of other available "Evening Report" minutes. Prior to and on November 14, 1962 there were available 97 unsold "Evening Report" minutes. These were also offered by ABC at a starting price for negotiations of $7,500 net per minute. By April 12, 1963, 33 had been sold, all in "package" sales at an average price of about $4,200 net per minute. The sales price was about the same as for Kemper minutes and the percentage of Kemper minutes sold is within the range of the percentage of non-Kemper minutes sold.

Kemper takes a strained view of ABC's selloff efforts. Its theory is that there is a precise mathematical relation between audience rating figures given by statistical services and value per minute applicable to all sponsored programs. It claims that the drop in audience rating of "Evening Report" since the negotiation of Kemper's contract brought the value of Kemper minutes down from $7,500 to $5,100

net per minute and contends, in effect, that ABC scared off possible purchasers by asking for $7,500 rather than $5,100. However, its argument loses sight of the practicalities of the situation—that ABC felt duty-bound to recover, if possible, the contract price; that ABC dealt with Kemper's minutes the same as it did with its other available "Evening Report" minutes; that the offering price was merely a starting price; that the actual sales prices realized on those "Evening Report" minutes which ABC succeeded in selling after negotiations were lower, though not by much, than Kemper's assumed value, proving that ABC did not turn down counteroffers because they were too low. The only reasonable conclusion is that there was no market as such at that time for sale of "Evening Report" minutes at higher prices. Certainly, ABC was interested in selling all the unsold "Evening Report" minutes, but the record establishes this could not be done in a manner consistent with its reasonable and regular business practice. ABC was not required, in the interest of minimizing Kemper's damages, to disrupt its business by selling Kemper minutes at such low prices as to assure a complete selloff. As it is, it went as far as it deemed advisable in selling at about the same price all it could of its "Evening Report" availabilities. Under the circumstances that price must be held to be a reasonable one; Kemper's own witnesses conceded that the effect of a large number of other availabilities would be to depress their stated value of $5,100 net per Kemper minute and that, in addition, a discount would normally be requested and granted if sold as part of a "package" sale.

Appendix B

The selloffs by ABC, less the station compensation payments attributable thereto, and by its five owned and operated stations, realized $36,664.04. Thus, ABC's recoverable damages are in the sum of $265,047.21.

As to interest, CPLR 5001 (subd. [b]) provides that it "shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." It has been noted that the judgment entered on the first cause of action for the unpaid November 9, 1962 telecast included interest from that date, November 9, 1962. Here, in view of the so-called "hiatus" conversation on November 14, 1962, the earliest "ascertainable" date the cause of action existed with respect to the seven play dates in 1962 was January 4, 1963. Interest is accordingly awarded on the sum of $84,333.20 from January 4, 1963 and on the respective sums of $12,047.60 for each of the 15 weekly play dates in 1963 from those respective play dates.

APPENDIX C

Opinion of Cooper, District Judge, Dated August 14, 1963, Denying Motion to Dismiss Complaint in Federal Court (221 F. Supp. 848)

AMERICAN MFRS. MUT. INS. CO.

v.

AMERICAN BROADCASTING, ETC.

This is a motion by defendant pursuant to F.R.Civ.P. 12(b) (6) to dismiss the complaint for failure to state a claim upon which relief can be granted, or in the alternative that certain paragraphs of the complaint and certain sections of the prayer for relief be stricken pursuant to Rule 12(f).

As to Rule 12(b) (6): For purposes of such a motion, all the material allegations in the complaint are deemed true. Further, in determining the merits of the motion, it must be borne in mind that, "* * * a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" 2 Moore's Federal Practice, 2d Ed. (1962), p. 2245.

Appendix C

The underlying action is for damages and injunctive relief resulting from an alleged violation of Sec. 1 of the Sherman Act, 15 U.S.C.A. §1. Upon oral argument, plaintiffs, often referred to as the Kemper Insurance Companies (hereinafter Kemper) abandoned all reliance on violations of the Clayton Act, 15 U.S.C.A. §15, for purposes of this motion.

Plaintiffs contend that certain contracts entered into by defendant television network (hereinafter ABC) were tying agreements; that these agreements were a per se violation of the Sherman Act; and that Kemper sustained damages as a result.

Sec. 1 of the Sherman Act reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *."

The detailed complaint outlines the structure of the television industry insofar as it relates to the agreements made by ABC with its affiliated stations and potential sponsors. Kemper alleges that it approached ABC seeking sponsorship of an ABC news program called "Evening Report." The sponsorship sought by Kemper was for 95 affiliated stations of ABC. However, ABC essentially refused to allow such sponsorship unless Kemper agreed to sponsor "Evening Report" on an additional 35 stations.

Kemper's business purposes required only the 95 stations, and it further contends that the 35 additional stations were completely useless to it, for they were in an undesir-

able market area. For purposes of this motion, as stated above, these allegations are deemed admitted.

Kemper contends that the two separate tying agreements resulted in: (1) the tie-in of 35 undesired stations to 95 desired stations and (2) the tie-in of sponsorship on 35 undesired stations to the basic sponsorship of the unique program "Evening Report."

Defendant relies heavily on Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), to show that there is only one product involved here, namely, sponsorship of television programs, and thus there can be no tying agreement. This court cannot agree that there is only one product involved in the instant action.

Thirty-five undesirable stations are not the same as 95 desirable stations. Nor are 35 additional stations the same product as the sponsorship of a unique program. Furthermore, the Times-Picayune case has been limited to the exact set of facts before the court and readily distinguishable from the instant case. Cf. Northern Pacific R. Co. v. United States, 356 U. S. 1, 10, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

Indeed, the rationale of Times-Picayune (345 U. S. at p. 605, 73 S.Ct. at p. 878, 97 L.Ed. 1277), adopted in later cases, does not support defendant's contentions.

> "Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. * * * By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any in-

> trisic superiority of the 'tied' product would convince freely choosing buyers to select it over others, anyway."

This is precisely the situation Kemper maintains confronts it. Kemper was unable to exercise its best judgment as to the desirability of sponsoring "Evening Report" on an additional 35 stations, for by refusing, it could not sponsor the program initially. This, coupled with the economic leverage ABC was able to wield over its affiliated stations and the program, constituted, Kemper maintains, a per se violation of Sec. 1 of the Sherman Act.

Defendant again relies on Times-Picayune for the proposition that there must be a monopoly power or dominance over the tying product in order to constitute a per se violation. However correct this interpretation of Times-Picayune may be, its effect was vitiated in Northern Pacific where the Supreme Court said 356 U. S. at p. 11, 78 S.Ct. at p. 521, 2 L.Ed.2d 545:

> "While there is some language in the Times-Picayune opinion which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of *per se* unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product."

This rationale was given added emphasis in United States v. Loew's Incorporated, 371 U. S. 38, at 45, 83 S.Ct.

97 at 102, 9 L.Ed.2d 11 (1962) where the court reaffirmed the position enunciated in Northern Pacific and immediately added:

> "Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

It is patent that the desirable program "Evening Report" is of a unique nature sufficient to give ABC a leverage to gain economic power over the tying product.

In addition, Kemper complains that by virtue of ABC's contracts with their affiliated stations, the affiliates are required to accept as sponsors for network programs those supplied by the network. This, too, contends Kemper, provides ABC with sufficient economic power to constitute a per se violation of the Sherman Act.

It cannot be said, therefore, that plaintiff is not entitled to any relief if the facts as alleged can be proved and demonstrated to a certainty.

Even if plaintiffs were not required to take the additional 35 stations, but would be forced, if they chose not to, to pay a disproportionately high rate for the 95 stations, this too would constitute a violation. See, United States v. Loew's Inc., supra, 371 U. S. 54, 83 S.Ct. 106-107, 9 L. Ed. 2d 11.

Defendant points to Productive Inventions Inc. v. Trico Products Corporation, 224 F. 2d 678 (2d Cir., 1955), cert.

denied 350 U. S. 936, 76 S.Ct. 301, 100 L.Ed. 818 (1956), and Conference of Studio Unions v. Loew's Inc., 193 F. 2d 51 (9th Cir., 1951), cert. denied 342 U. S. 919, 72 S. Ct. 342, 96 L. Ed. 687 (1952), in support of its contention that Kemper is not the proper party to bring this action. These cases are inapposite, for the plaintiffs in those cases were only indirectly harmed by the alleged restraints of trade.

It is true that the articles and reports quoted by plaintiffs in their memorandum are not determinative of the issue. However, their import is to manifest a directional change in the law which would seek to cover just such situations as the claims in the instant action. With the law in flux, this is all the more reason for denying a motion to dismiss for failure to state a claim upon which relief can be granted. Cf. Arfons v. E. I. Du Pont De Nemours & Company, 261 F. 2d 434 (2d Cir., 1954).

Accordingly, the motion to dismiss under Rule 12(b)(6) is denied.

Defendant moves, in the alternative, to strike certain of the paragraphs of the complaint and the prayer for relief. Some of these relate to the agreements between ABC and its affiliated stations; the others relate to a state court action instituted by ABC against Kemper and the requested injunction against this action.

Motions under Rule 12(f) are not favored. It is said in 2 Moore's Federal Practice, 2d Ed. (1962) at p. 2317:

> "Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied."

Even if the contracts between ABC and its affiliates do not constitute a tying agreement giving Kemper a cause of action, the allegations certainly have some bearing on the issues, even if only to demonstrate the economic power and leverage that ABC was able to exercise to control the tie-in.

The thrust of Rule 12(f), as discussed above, applies equally to the motion by ABC to strike those paragraphs relating to the state court action and the injunctive relief sought thereunder.

Defendant directs this court to Avon Publishing Co. v. American News Company, 143 F. Supp. 516 (S.D.N.Y. 1956), in addition to 28 U.S.C. §2283, as grounds for striking these matters. In Avon, an application for a preliminary injunction was denied, for there was no judgment of a federal court which required the protection afforded by the issuance of an injunction against a state court action. In the instant case, Kemper seeks an injunction only if and when the contract is found to be violative of the Sherman Act, and if such an injunction would be necessary to effectuate the judgment of this court. As the court in Avon said 143 F. Supp. at 519:

> "In the case at bar the contract, which is the subject of the action in the New York Supreme Court, has not been adjudicated as illegal under the Antitrust Acts and, therefore, there is no judgment in this Court which must be preserved by the issuance of an injunction."

The granting or denying of an injunction is properly within the ambit of the trial court upon a determination of

the issues in this case; the paragraphs relating to the state action and injunctive relief should not be stricken at this juncture.

Accordingly, defendant's motion is denied in its entirety.

This is to be considered an order; no settlement thereof is necessary.

So ordered.

APPENDIX D

Opinion of Mr. Justice Harlan Dated August 1, 1966, and Order Staying Judgment Pending Certiorari

SUPREME COURT OF THE UNITED STATES

No. ——. October Term, 1966.

American Manufacturers Mutual Insurance Co. *et al.*,

Petitioners,

v.

American Broadcasting-Paramount Theatres, Inc.

On Application for Stay Pending Certiorari.

[August 1, 1966.]

Memorandum of Mr. Justice Harlan.

This is an application for a stay, pending certiorari, of the enforcement of a New York Supreme Court money judgment awarded against petitioners in an action for breach of a radio broadcasting sponsorship contract. The questions sought to be brought to this Court for review all relate to the state court's disallowance of a defense predicated on the alleged illegality of this contract under federal antitrust laws. Having carefully considered the papers on both sides, and mindful that what is here involved is a state judgment and state cause of action, I conclude that

the requested stay should issue, conditioned, however, as hereafter indicated.

The claim that the contract in suit entailed a federally illegal "tying" arrangement cannot be regarded as lacking in substance in light of *Associated Press* v. *Taft-Ingalls Corp.*, 340 F. 2d 753, cert. denied, 382 U. S. 820, and does not appear to be precisely controlled by any decision of this Court. The posture of federal law relating to the availability of the asserted antitrust defense in this contract action is to say the least highly debatable. See *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227; *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 731; *Kelly* v. *Kosuga*, 358 U. S. 516. And the view of the state court that it could render judgment for the respondent without adjudicating the merits of petitioners' antitrust defense also presents a federal question which cannot be deemed devoid of substance. In these circumstances I am unable to say that the case bears no reasonable chance of review by this Court.

I have also deemed it incumbent upon me to consider two further questions, although they have been little if at all pressed in respondent's papers. The first is the failure of petitioners to show what ultimate damage they will suffer by reason of having to pay the judgment pending certiorari. The second is the ambiguity that exists as to whether petitioners sought a stay pending certiorari from the state courts before coming to me. I conclude that neither of these points prevents issuance of the requested stay.

With respect to a case arising in the federal system it seems to be accepted that a party taking an appeal from

the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with Fed. R. Civ. P. 62 (d) and 73 (d), see *In re Federal Facilities Realty Trust,* 227 F. 2d 651, 655; 7 Moore, Federal Practice ¶62.06 (2d ed. 1955); 3 Baron & Holtzoff, Federal Practice and Procedure §1374 (rules ed. 1958), and I perceive no substantial countervailing reason why at the certiorari stage this federal policy should not be applied to state cases presenting arguably substantial federal questions. As to the other question, I am disposed to accept Judge Van Voorhis' stay of judgment pending the making of this application as entailing sufficient compliance on the part of petitioners with this Court's Rule 27, and respondent does not argue to the contrary.

An order will issue staying enforcement of the New York judgment pending the timely filing of the petition for certiorari. Should such petition be so timely filed, this stay is to remain in effect pending the action of this Court on such petition. In the event the petition is denied, this stay shall terminate automatically. Should the petition for writ of certiorari be granted, this stay is to remain in effect pending the issuance of the mandate of this Court. This stay is conditioned upon the posting of a good and sufficient surety bond in the principal amount of the judgment and providing for costs, interest and damages for delay. Compare Supreme Court Rule 18. Such bond is to be posted with and approved by the Supreme Court of New York County, or a judge thereof, and when so posted and approved to be filed with the clerk of that court.

In reaching this decision I imply no view whatever upon any phase of the ultimate merits of the underlying controversy.

Appendix D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1966

AMERICAN MANUFACTURERS
MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

vs.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

UPON CONSIDERATION of the application of counsel for the petitioners and of the opposition of the respondent thereto,

IT IS ORDERED that the execution and enforcement of the judgment of the Supreme Court of New York County in the above-entitled case be, and the same is hereby, stayed pending the timely filing of a petition for writ of certiorari. Should such petition be so timely filed, the stay is to remain in effect pending action in this Court on such petition. In the event the petition is denied, the stay is to terminate automatically. Should the petition for writ of certiorari be granted, the stay is to remain in effect pending the issuance of the mandate of this Court.

Appendix D

The stay is conditioned upon the posting of a good and sufficient surety bond in the principal amount of the judgment and providing for costs, interest and damages for delay. Compare Supreme Court Rule 18. Such bond is to be posted with, and approved by, the Supreme Court of New York County, or a judge thereof and, when so posted and approved, to be filed with the Clerk of that Court.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States

Dated this 3rd
day of August, 1966.

A true copy JOHN F. DAVIS
Test:
Clerk of the Supreme Court
of the United States

By E. P. SULLIVAN
Chief Deputy

APPENDIX E

Orders and Judgments Below

Order Entered September 16, 1963, Dismissing Defense of Illegality Under the Sherman Act (Sixth Affirmative Defense)

At a Special Term, Part I, of the Supreme Court, held in and for the County of New York, at the New York County Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 12th day of September, 1963.

Present:

Hon. SAMUEL R. SILVERMAN, Justice

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff,

against

American Mfrs. Mutual Insurance Co.; American Motorists Insurance Co.; Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies," and Clinton E. Frank, Inc.,
Defendants.

The plaintiff having moved to strike out the affirmative defenses, dismiss the counterclaims, strike out certain por-

tions of the answer and for summary judgment pursuant to Rules 103, 109 and 113 of the former Rules of Civil Practice,

Now, on reading and filing the notice of motion dated May 31, 1963 and the affidavit of Donal L. Flynn, sworn to the 31st day of May, 1963, and Exhibits "A", "B", "C", "D", "E", "F" and "G" annexed thereto, and the affidavit of James C. Hagerty, sworn to the 28th day of May, 1963, with proof of due service thereof, in support of the motion, and the affidavit of John W. Castles III, sworn to the 20th day of June, 1963, and the affidavit of James S. Kemper, Sr., sworn to the 19th day of June, 1963, and the affidavit of James S. Kemper, Jr., sworn to the 19th day of June, 1963, and the affidavit of Buckingham W. Gunn, sworn to the 18th day of June, 1963, in opposition to the motion, and the affidavit of Donal L. Flynn, sworn to the 21st day of June, 1963, in reply, and the amended complaint and answer herein, and after hearing Clarence Fried, of counsel for Hawkins, Delafield & Wood, attorneys for the plaintiff, in support of the motion, and John W. Castles III, of counsel for Lord, Day & Lord, attorneys for the defendants, in opposition, and due deliberation having been had, and upon filing the opinion of the Court, it is on motion of Hawkins, Delafield & Wood, attorneys for the plaintiff,

ORDERED that the motion to strike the first, second, third, fourth, fifth and sixth defenses be and the same is hereby granted pursuant to the former Rules of Civil Practice 109, Subdivision 6, and the Civil Practice Law and Rules, Sec-

tion 3211(b), and the first, second, third, fourth, fifth and sixth defenses are hereby stricken from the answer as insufficient; and it is

FURTHER ORDERED that the motion to strike the first and second partial defenses be and the same is hereby denied; and it is

FURTHER ORDERED that the motion to dismiss the first and second counterclaims be and the same hereby is granted under the former Rules of Civil Practice 109, Subdivision 5, and under the Civil Practice Law and Rules, Section 3211(a), Subdivision 7, and the said first and second counterclaims of the answer be and the same are hereby dismissed; and it is

FURTHER ORDERED that the motion to strike portions of the answer under the former Rules of Civil Practice 103 be and the same is hereby granted only to the extent of striking Subparagraphs 8.(a) through 8.(f) and Paragraph 87. of the answer and otherwise said motion be and it is hereby denied; and it is

FURTHER ORDERED that summary judgment be and is hereby granted dismissing the complaint as to the defendant Clinton E. Frank, Inc.; and it is

FURTHER ORDERED that summary judgment be and is hereby denied as to the second cause of action; and it is

FURTHER ORDERED that summary judgment be and is hereby granted in favor of the plaintiff against all the

remaining defendants named in the complaint as to the first cause of action for the sum of $19,818.43, together with interest from November 9, 1962 and the costs and disbursements of said action to be taxed by the Clerk of this Court, and the Clerk of this Court is hereby directed to enter judgment in favor of the plaintiff and against the remaining defendants for said sum of $19,818.43, together with interest thereon from November 9, 1962 and the costs and disbursements of said action to be taxed as aforesaid, and that the action is severed accordingly.

Enter.

/s/ S. J. S.
J. S. C.

FILED
September 16, 1963
New York County Clerks Office.

Appendix E

Order of Affirmance Entered April 30, 1964, on First Appeal to New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of April, 1964.

Present—

Hon. Charles D. Breitel, Justice Presiding
" Francis L. Valente)
" James B. M. McNally,) Justices
" Harold A. Stevens,)
" Samuel W. Eager,)

7305

Order of Affirmance on Appeal from Order and Judgment

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff-Respondent,

vs.

American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies," and Clinton E. Frank Inc.,
Defendants-Appellants.

An appeal having been taken to this Court by the defendants-appellants from so much and such parts of an

order of the Supreme Court, New York County, entered on the 16th day of September, 1963, as is set forth in the Notice of Appeal herein, and from the judgment entered in the office of the Clerk of the County of New York on the 19th day of September, 1963, and said appeal having been argued by Mr. John W. Castles, 3d of counsel for the appellants, and by Mr. Clarence Fried of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is hereby unanimously ordered and adjudged that the judgment and order so far as appealed from be and and the same are hereby, in all things, affirmed on the opinion of Mr. Justice Silverman at Special Term; and that the respondent recover of the appellants the costs of this appeal.

Enter:

Vincent A. Massi,
Clerk.

Filed Apr 30, 1964

Appendix E

Judgment Entered March 18, 1965, After Trial on Issue of Damages in New York Supreme Court, New York County, Trial Term, Part X

[SAME TITLE]

This action having been regularly brought to trial on the 4th, 5th, 6th, 9th, 10th, 16th, 17th, 18th, 19th days of November, 1964 and 22nd day of January, 1965 at Special and Trial Term Part X of this Court held in and for the County of New York and after hearing the proofs and allegations of the parties and after hearing Hawkins, Delafield & Wood, Esqs., Clarence Fried, of counsel, attorneys for plaintiff, and Lord, Day & Lord, Esqs., John W. Castles 3d, of counsel, attorneys for defendants American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies", and Clinton E. Frank, Inc., and the Court having duly made and filed its decision in writing on the 12th day of March, 1965 and the complaint having been previously dismissed as against Clinton E. Frank, Inc. in the judgment entered September 19, 1963

Now, on motion of Clarence Fried, of counsel for the plaintiff, it is

ADJUDGED that the plaintiff have judgment against all the defendants (except Clinton E. Frank, Inc., the complaint having been dismissed as against said defendant

in the judgment entered September 19, 1963) in this action dismissing on the merits defendants' second partial defense (amended at the trial to be asserted as a complete defense) and that the plaintiff recover from the defendants, except Clinton E. Frank, Inc., the sum of $265,047.21 with interest on the sum of $84,333.20 from January 4, 1963 amounting to $11,160.10, on the sum of $12,047.60 from January 4, 1963 amounting to $1,594.30, on the sum of $12,047.60 from January 9, 1963 amounting to $1,584.26, on the sum of $12,047.60 from January 18, 1963 amounting to $1,566.19, on the sum of $12,047.60 from January 23, 1963 amounting to $1,556.15, on the sum of $12,047.60 from February 1, 1963 amounting to $1,540.09, on the sum of $12,047.60 from February 6, 1963 amounting to $1,530.05, on the sum of $12,047.60 from February 15, 1963 amounting to $1,511.97, on the sum of $12,047.60 from February 20, 1963 amounting to $1,501.93, on the sum of $12,047.60 from March 1, 1963 amounting to $1,479.85, on the sum of $12,047.60 from March 6, 1963 amounting to $1,469.81, on the sum of $12,047.60 from March 15, 1963 amounting to $1,451.74, on the sum of $12,047.60 from March 20, 1963 amounting to $1,441.69, on the sum of $12,047.60 from March 29, 1963 amounting to $1,423.63, on the sum of $12,047.60 from April 3, 1963 amounting to $1,415.59, and on the sum of $12,047.60 from April 12, 1963 amounting to $1,397.52, all interest aggregating the sum of $33,624.87, making a total of $298,672.08, together with the costs and disbursements in the sum of $192.95 as taxed, making in all the sum of $298,865.03.

Appendix E

Judgment signed this 18th day of March, 1965.

Dated: New York, New York
March 18, 1965

/s/ JAMES McGURRIN
Clerk

Filed
Mar 18 1965
New York
County Clerk's Office

PLAINTIFF'S ADDRESS:

American Broadcasting-Paramount Theatres, Inc.
7 West 66th Street
New York 23, New York

DEFENDANTS' ADDRESSES:

The Kemper Insurance Companies
4750 Sheridan Road
Chicago 40, Illinois

American Mfrs. Mutual Insurance Co.
American Motorists Insurance Co.
Federal Mutual Insurance Co.
Lumbermen's Mutual Casualty Co.
342 Madison Avenue
New York, New York

Appendix E

Order of Affirmance Entered November 23, 1965, on Second Appeal to New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of November, 1965.

Present—

Hon.	Charles D. Breitel,	Justice Presiding
"	Benjamin J. Rabin,	)
"	Francis L. Valente,	) Justices
"	Samuel W. Eager,	)
"	Aron Steuer,	)

9489

Order of Affirmance on Appeal from Judgment

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff-Respondent,

vs.

American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies,"
Defendants-Appellants.

An appeal having been taken to this Court by the defendants-appellants from the judgment of the Supreme

Appendix E

Court, New York County, entered on the 18th day of March, 1965, in favor of plaintiff and against defendants in the sum of $298,865.03, and said appeal having been argued by Mr. John W. Castles, 3d of counsel for the appellants, and by Mr. Clarence Fried of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondent recover of the appellants $50 costs of this appeal, on the opinion of Mr. Justice Geller at Special and Trial Term.

Enter:

Hyman W. Gamso
Clerk.

Filed Nov 23 1965

Appendix E

Order of Appellate Division Entered February 3, 1966, Granting Leave to Appeal to New York Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of February, 1966.

Present—

Hon.	Charles D. Breitel,	Justice Presiding
"	Benjamin J. Rabin,	)
"	Francis L. Valente,	) Justices
"	Samuel W. Eager,	)
"	Aron Steuer,	)

9489

Order Granting Leave to Appeal to Court of Appeals from Final Judgment

American Broadcasting-Paramount Theatres, Inc.,
Plaintiff-Respondent,

vs.

American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., collectively known as and doing business under the style and name of "The Kemper Insurance Companies,"

Defendants-Appellants.

The above-named defendants having moved this Court for leave to appeal to the Court of Appeals from the order of this Court entered in the office of the Clerk of this Court

on November 23, 1965, affirming the judgment of the Supreme Court, New York County, entered in the Office of the Clerk of the County of New York on March 18, 1965 and from said judgment, in order to review the aforesaid order, judgment, and the order of this Court entered on April 30, 1964 affecting said order and judgment,

Now, upon reading and filing the notice of motion dated December 23, 1965, with proof of service thereof, the affidavit of John W. Castles 3d sworn to on December 23, 1965, in support of the motion, the affidavit of Clarence Fried sworn to on December 30, 1965, in opposition thereto, and the reply affidavit of John W. Castles 3d sworn to on January 3, 1966, in support of the motion, and upon the aforesaid orders of this Court entered on April 30, 1964 and November 23, 1965, the records on appeal, and upon all of the proceedings heretofore had herein, and the said motion having been submitted by Lord, Day & Lord, the attorneys for defendants-appellants, in support of said motion, and by Hawkins, Delafield & Wood, the attorneys for the plaintiff-respondent in opposition thereto, and this Court having filed its decision in writing granting said motion, it is hereby:

ORDERED that the motion for leave to appeal be, and it hereby is, granted, and this Court hereby states that questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals.

Enter:

Samuel W. Eager

Filed Feb. 3—1966

Appendix E

Order of Affirmance of New York Court of Appeals
Dated June 2, 1966

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk*

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1. No. 91. 66

American Broacasting-Paramount Theatres, Inc.,
Respondent,

vs.

American Mfrs. Mutual Insurance Co., & ors., &c.,
Appellants,

and

Clinton E. Frank, Inc.,
Defendant.

Appendix E

BE IT REMEMBERED, that on the 26th day of February in the year of our Lord one thousand nine hundred and sixty-six, American Mfrs. Mutual Insurance Co., & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Lord, Day & Lord, their attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And American Broadcasting-Paramount Theatres, Inc., the respondent—in said cause, afterwards appeared in said Court of Appeals by Hawkins, Delafield & Wood, its attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John W. Castles, III, of counsel for the appellants, and by Mr. Clarence Fried, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it

given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 2, 1966

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon
Clerk.

SEAL

APPENDIX F

Amended Complaint

[Same Title]

Plaintiff, by its attorneys, Hawkins, Delafield & Wood, complaining of the defendants, respectfully alleges:

As and for a First Cause of Action

First: Plaintiff is a domestic corporation.

Second: Upon information and belief, the defendant American Mfrs. Mutual Insurance Co. is a domestic corporation.

Third: Upon information and belief, the defendant American Motorists Insurance Co. is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

Fourth: Upon information and belief, the defendant Federal Mutual Insurance Co. is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

Fifth: Upon information and belief, the defendant Lumbermen's Mutual Casualty Co. is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

Sixth: Upon information and belief, the defendants American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co., and Lumbermen's Mutual Casualty Co., together with the Fidelity

Life Association, an Illinois corporation, are collectively known as and are conducting business under the trade name and style of "The Kemper Insurance Companies."

SEVENTH: Upon information and belief, the defendant Clinton E. Frank, Inc. is a foreign corporation organized under the laws of the State of Delaware with its office and principal place of business in the City of Chicago, State of Illinois and has an office and does transact business at 527 Madison Avenue in the City, County and State of New York.

EIGHTH: On or about August 15, 1962 plaintiff and defendants entered into a television network contract whereby defendants agreed to sponsor one broadcast of plaintiff's television program "Evening Report" per week for a period of 26 weeks commencing on October 17, 1962, said program to be broadcast over plaintiff's ABC-TV Network. A copy of said contract is annexed hereto and made a part hereof, marked Exhibit A.

NINTH: Pursuant to said contract, plaintiff broadcast the program "Evening Report" over its television network under defendant's sponsorship on November 9, 1962.

TENTH: Under the terms of said contract, defendants were required to pay to plaintiff the sum of $19,818.43 for said broadcast of November 9, 1962.

ELEVENTH: Defendants have failed and refused to pay the aforesaid sum to plaintiff, although payment has been duly demanded.

TWELFTH: Plaintiff has duly performed all the terms and conditions of the aforesaid agreement on its part to be performed.

Appendix F

AS AND FOR A SECOND CAUSE OF ACTION

THIRTEENTH: Plaintiff repeats and realleges the allegations contained in paragraphs "FIRST" through "EIGHTH" and paragraph "TWELFTH" of this amended complaint with the same force and effect as though fully set forth in this paragraph.

FOURTEENTH: On or about November 14, 1962 defendants breached the aforesaid television network contract by refusing to permit plaintiff to continue to broadcast said program under defendants' sponsorship and by cancelling said sponsorship, and by instructing plaintiff to return all of defendants' schedules, film commercials and scripts.

FIFTEENTH: Plaintiff at all times has been ready and willing to make full performance of the said agreement and would have done so except for the acts of defendants as herein alleged.

SIXTEENTH: By reason of the foregoing, there is now due by defendants to plaintiff the sum of $432,693.22.

WHEREFORE, plaintiff demands judgment against defendants in the sum of $19,818.43 under the first cause of action and judgment in the sum of $432,693.22 under the second cause of action, together with interest thereon as provided by law and the costs and disbursements of this action.

HAWKINS, DELAFIELD & WOOD
Attorneys for Plaintiff
Office and P. O. Address
67 Wall Street
New York 5, New York

(Verified May 2, 1963.)

Appendix F

"Exhibit A" Appended to Amended Complaint

AMERICAN BROADCASTING COMPANY
7 West 66th Street - New York 23, N. Y.
Susquehanna 7-5000

August 15, 1962

Clinton E. Frank, Inc.
Merchandise Mart
Chicago 54, Illinois

Attention: Mr. A. S. Trude, Jr.
Vice President & Director of Media

Gentlemen:

This will acknowledge with thanks receipt of your letter dated June 5, 1962. The following shall set forth the agreement between you and us for sponsorship by your client, The Kemper Insurance Companies, of the ABC Evening Report to be telecast during the 1962-1963 season over the ABC-TV Network on the following terms and conditions:

1. The firm order is for one program per week over a twenty-six week period beginning October 17, 1962. This program is scheduled in the evening hours (Monday thru Friday) at the following times in the following time zones:

Eastern	6:00-7:30 PM
Central	5:30-6:30 PM
Mountain	5:30-6:30 PM
Pacific	6:00-7:30 PM

In the event a specific station is scheduled (or rescheduled) outside of the time pattern for a particular time zone as set forth above, your client shall have the right to cancel

its sponsorship of such station on four weeks prior notice. Commencing with the telecast scheduled for October 17, 1962, WBKB, ABC-TV's Chicago affiliate, shall telecast the program between 5:45-6:00 PM. Any station's failure to clear shall not constitute a breach of contract. ABC has the right to schedule station breaks in accordance with its then current policy.

2. The day of the week is to be Wednesday alternating weekly with Friday over the twenty-six week period. Week 1, Wednesday sponsorship; Week 2, Friday sponsorship; Week 3, Wednesday sponsorship; Week 4, Friday sponsorship; and so on throughout the twenty-six week period. THE KEMPER INSURANCE COMPANIES shall have sole sponsorship of the EVENING REPORT program on the days of their sponsorship.

3. The time charges for the stations indicated as Group I & III on the ordered station lineup attached are based on the rates in effect as of June 5, 1962 (which rates are subject to change on six months prior notice), and are based upon 40% of the applicable gross hourly rate, less a special 42.5% discount in lieu of all other discounts. These rates are subject to agency commission.

4. The time charges for the stations indicated as Group II on the ordered station lineup attached are based on the rates in effect as of June 5, 1962 (which rates are subject to change on six months prior notice), and are based upon 40% of the applicable gross hourly rate, less a special 50% discount in lieu of all other discounts. These rates are subject to agency commission.

Appendix F

5. THE KEMPER INSURANCE COMPANIES have the right to accept or reject any additional stations to the lineup shown on the attached ordered station lineup.

6. The program cost is $5,000. net per one-quarter hour delivered. The networking charge is $500. gross per one-quarter hour delivered.

7. The telecast schedule is subject to force majeure omissions, preemptions and delays for the purpose of broadcasting programs reasonably deemed by ABC to be of major public importance and the telecast schedule is also subject to withholdings in accordance with ABC's established practice applicable to such situations. In the event of such total omissions, preemptions, delays or withholdings, ABC shall attempt to arrange a mutually acceptable make good in the ABC EVENING REPORT program. Failing such mutually agreeable make good, KEMPER INSURANCE shall be entitled to a pro rata credit. In the event of such omissions, preemptions, delays or withholdings, subject to exigency, an announcement of KEMPER INSURANCE COMPANIES' sponsorship of such omitted, preempted, delayed or withheld program will be made. ABC shall make every reasonable effort to keep local preemptions at a minimum. *DLF* *AST*

The complete cancellation caused by voluntary preemption or by transmission failure yields full airtime credit to a sponsor so affected.

8. A time charge credit issued for a partial impairment of program airtime would be based upon an exact proration of time lost with respect to time scheduled. Because pro-

gram airtime loss could conceivably occur anywhere within a show, and because program formats differ widely, no standard credit processing system would ever attempt to distinguish between the relative importance of any one program portion with respect to any other. Therefore a loss of any portion of any show is given the same regard. That is, a partial program airtime loss from the top of a show, whether due to a local transmitter failure, AT&T line failure or run-over of the preceding program, would be treated in the same manner as a partial loss of any other point within the show. One minute of program airtime must be lost before time charge credit will be issued. As a matter of policy, all initial credits are calculated on the program airtime loss.

A. The American Broadcasting Company, consistent with the industry-wide procedure of allowing a percentage of the interruption if only one signal (video or audio) is impaired, reduces a time charge credit by 25% for video loss or 50% for audio loss of program time.

9. If the commercial message is interrupted, the time charge credit is based on the proration that the amount of commercial time interrupted bears to the total commercial time in the program. ABC's usual method for determining the value of commercial damage is based upon the fact that a maximum of 200 seconds of commercial time is allowed a sponsor for one-half hour of class A time; i.e., 180 seconds devoted to actual commercials and twenty seconds allotted to billboards. In cases where this amount is exceeded, then such average is deducted from the length of

commercial time and the resulting figure then prorated over the 200 second base. When no average occurs, i.e., when the total commercial minute is equal to or under the allotted *DLF*
amount, then an exact proration of time lost over time *AST*
scheduled is made. A minimum amount of seven seconds *DLF*
of commercial time must be lost before a time charge credit *AST*
can be issued.

10. THE KEMPER INSURANCE COMPANIES shall have two and one-half minutes of commercial time plus a ten second opening and a ten second closing billboard per one-quarter hour. There shall be three commercial positions within each program.

11. ABC will endeavor to provide on a network basis a separation of fifteen minutes between KEMPER INSURANCE commercials and billboards and any commercials or billboards in adjacent programs which are competitive to KEMPER INSURANCE COMPANIES' authorized products. Product protection may be reduced by several minutes from time to time due to format exigencies but in no event less than ten minutes. Furthermore, ABC during any week of which *DLF*
KEMPER INSURANCE is a sponsor of the ABC EVENING RE- *AST*
PORT program, will not authorize for advertising on a net- *DLF*
work basis on the ABC EVENING REPORT program products *AST*
or services competitive to the products and services authorized to be advertised on the program by THE KEMPER INSURANCE COMPANIES. It is understood that ABC will not accept any other product categories or commercials which are not in good taste as determined by the ABC Continuity Department.

Appendix F

12. ~~In lieu of this paragraph, please substitute the following:~~ ABC agrees to indemnify, defend and hold harmless THE KEMPER INSURANCE COMPANIES, Clinton E. Frank, Inc., and their respective directors, officers, agents, and employees from and against any and all suits, claims, liabilities, infringements, loss, damages, costs, expenses reasonable attorneys' fees, including reasonable attorneys' fees, costs and expenses in enforcing this covenant, which may arise in whole or in part out of the preparation or telecasting of ABC material described hereunder and to defend at ABC's own expense any litigation instituted by others against any of them resulting therefrom and KEMPER INSURANCE COMPANIES shall similarly indemnify, defend, and hold harmless ABC, and its directors, officers, agents, employees and stations telecasting the program with respect to any material furnished for telecasting by THE KEMPER INSURANCE COMPANIES, provided that ABC is not negligent in the handling of such material.

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13. ABC authorizes THE KEMPER INSURANCE COMPANIES to use and license others to use during the term hereof the title of the program, and the name, sobriquet, biography and likeness of regular featured personalities in the program for informative purposes and to advertise and publicize the network and the program, in whole and in part, either alone or in conjunction with the advertising of the protected products of KEMPER as designated hereunder. Any such use of advertising or publicity by KEMPER INSURANCE pursuant to this paragraph shall not constitute a direct or implied endorsement. All such publicity material and advertising material shall be subject to the prior approval

DLF
AST

of the ABC Advertising and Promotion Department in New York. ABC shall not unreasonably withhold its approval and such approval shall be obtained through ABC-Chicago, after it has been transmitted from ABC-New York.

14. ABC will furnish for each program all elements for the program presentation including, without limitation, network facilities, the principal and/or featured personalities, other cast, rights, script, direction, music and production facilities and services therefore, including scenery, props, costumes, studio and technical facilities and personnel necessary to the appropriate television presentation of the program. Each ABC supplied program will conform to ABC's programming and operating policies and technical standards. Program content, format and quality shall continue on the high standards of current ABC EVENING REPORT programs.

15. ABC shall announce at the end of each KEMPER INSURANCE sponsored ABC EVENING REPORT program that "ABC's News Department is solely responsible for this telecast", or words to similar effect.

16. If any performer regularly employed in connection with the ABC EVENING REPORT program commits or has at any time committed any act, knowledge of which is made public during the term of this agreement (May 4, 1962 to the end of the contract period), or does anything which shall be an offense involving moral turpitude or which brings Clinton E. Frank, Inc., or THE KEMPER INSURANCE COMPANIES into public disrepute, contempt, scandal or rid-

icule, or which might insult or offend the community or any substantial group thereof, THE KEMPER INSURANCE COMPANIES have the right within fifteen (15) days after such act or thing becomes generally known to require ABC to terminate as soon as possible the services of such person and furnish a substitute of comparable stature or if the same becomes generally known before May 4, 1962 THE KEMPER INSURANCE COMPANIES shall have the right to request similar termination and/or substitutions within fifteen (15) days from the time KEMPER is informed by ABC, or KEMPER INSURANCE learns that such person will appear on the program. This right may only be exercised providing ABC and KEMPER INSURANCE concur. ABC shall not unreasonably withhold its concurrence.

17. ABC agrees that all costs reflected within this order represent the full charges to THE KEMPER INSURANCE COMPANIES for the programs ordered herein and include cable, line and network, program and time charges.

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Commercial treatment charges will be additional and ABC will be reimbursed by KEMPER INSURANCE for their proportionate share of any sales and/or use tax charges which ABC pays in connection with the programs sponsored by KEMPER INSURANCE.

18. THE KEMPER INSURANCE COMPANIES shall furnish to ABC all commercial material and billboards at their expense and in accordance with ABC's delivery and acceptability policies. KEMPER INSURANCE shall pay for insertion, integration and any other services or facilities which ABC

Appendix F

and/or supplier furnishes in connection with commercials or billboards at the applicable ABC and/or supplier rates.

Please confirm that the foregoing constitutes the understanding and agreement between you and us and shall remain so until superseded or amended by some other written document or documents signed by both of us.

Very truly yours,

AMERICAN BROADCASTING COMPANY
A Division of American Broadcasting-Paramount Theatres, Inc.

By DONAL L. FLYNN
Assistant General Sales Attorney

Accepted and Agreed to:

CLINTON E. FRANK, INC.

By ALFRED S. TRUDE, JR.
8/20/62

Appendix F

Group I **August 15, 1962**

ATTACHMENT A

To ABC's Acknowledgment of
Kemper Insurance Company's Order for sponsorship

of

ABC EVENING REPORT

Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*	
WAKR-TV	Akron	6:45	$ 150		
WFBG-TV	Altoona	Pending	1,000		
WAST	Albany, N. Y.	6:30	900		
WAIN-TV	Anderson	6:45	150		
WLOS-TV	Asheville	6:45	750		
WIW-A	Atlanta	7:15	1,100		
WROW	Augusta, Ga.	6:00	375		
WJZ-TV	Baltimore	6:15	1,650		
New	Binghampton	Pending	Rate to be Determined		
WNAC-TV	Boston	6:00	2,800		
WUSN-TV	Charleston, S. C.	6:15	500		
WHTN	Huntington, W. Va.	6:45	850		
WTVC	Chatanooga	6:00	450	500	1/1/63
WKRC-TV	Cincinnati	6:00	1,750		
WCCA-TV	Columbia, S. C.	6:45	200		
WXYZ-TV	Detroit	6:30	3,000		
WICU-TV	Erie	6:45	725		
WJPB	Fairmont	6:15	225		
WPTA	Fort Wayne	7:15	525		
New	Greenville, Wash.	Pending	Rate to be Determined		
WTPA	Harrisburg, Pa.	6:15	425		
WHYN-TV	Holyoke	7:15	450		
WLW-1	Indianapolis	6:15	1,400		
WTVK	Knoxville	6:00	300		
WLYH-TV	Lebanon	7:15	300		
WLVA-TV	Lynchburg	6:30	350		
WKYT	Lexington	6:00	165	200	12/1/62

Appendix F

Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*
WNUR-TV	Manchester	6:45	600	
WMTW-TV	Mt. Washington	7:00	700	
WNHC-TV	New Haven	7:00	1,750	
WABC-TV	New York	6:00	6,750	
WVEC-TV	Norfolk	6:15	850	
WLOF-TV	Orlando	6:00	525	
WFIL-TV	Philadelphia	7:15	4,000	
WTAE	Pittsburgh	6:15	2,500	
WRVA	Richmond	7:15	700	
WSUN-TV	St. Petersburg	6:00	475	
WNEP-TV	Scranton	6:45	650	
WSPD-TV	Toledo	7:00	1,000	
WATR-TV	Waterbury	6:00	200	
WMAL-TV	Washington, D. C.	6:00	1,650	
WEAT-TV	West Palm Beach	6:30	225	
WSBA-TV	York	6:45	250	
WKST-TV	Youngstown	6:45	450	
KTEN-TV	Ada	5:45	225	
KTET-TV	Austin, Minn.	6:15	300	
KBMT-TV	Beaumont	5:30	350	
WBRC-TV	Birmingham	5:45	1,450	
KORG-TV	Cedar Rapids	5:30	625	
WBKB-TV	Chicago	5:45	4,200	
WFAA-TV	Dallas	5:45	1,500	
WTVP	Decatur, Ill.	6:00	400	
WOI-TV	Des Moines	5:30	700	750 eff. 1/1/63
WTVW	Evansville	5:30	700	
KXGO-TV	Fargo	5:15	300	
KNOX-TV	Grand Forks	5:15	100	
WLUK-TV	Green Bay	5:30	600	
WSIL-TV	Harrisburg, Ill.	5:45	350	
KAYS-TV	Hays, Kan.	5:30	Cancelled eff. 9/1/62 as Prime Affil.	
KHPL-TV	Hays Center, Neb.	6:00	Bonus	
KTRK-TV	Houston	6:15	1,350	1,450 eff. 1/1/63
KMBC-TV	Kansas City	5:45	1,500	

Appendix F

Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*
KHOL-TV	Kearney	6:15	400	
KATV	Little Rock	Pending	500	
New	Lake Charles, La.	Pending	Rate to be Determined	
WLKY-TV	Louisville	6:00	100	150 eff. 1/1/63
WKOW-TV	Madison	6:00	325	
WHBQ-TV	Memphis	Pending	1,100	
KNSP-TV	Minneapolis	6:00	1,250	
WEAR-TV	Mobile	5:30	500	
WSIX-TV	Nashville	5:45	950	
WVUE	New Orleans	6:15	800	
KOCO-TV	Oklahoma City	5:30	700	
KETV	Omaha	5:30	950	
KCND-TV	Pembina	4:45	Bonus	
WTVH-TV	Peoria	5:45	525	550 eff. 1/1/63
WREX-TV	Rockford	5:30	600	
KTVI	St. Louis	5:45	1,650	
KONO-TV	San Antonio	5:45	875	
KTBS-TV	Shreveport	6:15	600	
WSJV-TV	South Bend	5:45	450	
KTUL-TV	Tulsa	5:45	775	800 eff. 1/1/63
KAKE-TV	Wichita	5:30	900	
KSWO-TV	Wichita Falls	6:15	300	
KVKM-TV	Monahans	6:45	Bonus	
KOAT-TV	Albuquerque	5:45	350	
KRDO-TV	Colo. Springs	Pending	300	
KBTV	Denver	5:30	900	950 eff. 1/1/63
KTVK	Phoenix	5:45	550	
KCPX	Salt Lake City	6:15	800	
KEZI-TV	Eugene	6:00	200	225 eff. 1/1/63
KLYD-TV	Bakersfield	6:45	250	
KOTI-TV	Klamath Falls	5:00	150	
KABC-TV	Los Angeles	6:15	4,000	
KPTV	Portland	6:45	1,050	
KGO-TV	San Francisco	7:15	2,400	
KNTV	San Jose	6:15	300	

Appendix F

Station	*Market*	*Local Time*	*Present Class "A" Hr. Rate*	*Rate Increase (if any)*
KOMO-TV	Seattle	6:15	1,500	
KREM-TV	Spokane	6:15	550	
KNDO-TV	Yakima	6:30	325	350 eff. 11/1/62
KNDU-TV	Richland	6:30	Bonus	
KSIN-TV	Salina	5:45	Bonus	
Group II				
WKBW-TV	Buffalo	7:15	1,500	2,000 eff. 1/1/63
WEWS	Cleveland	Pending	2,600	
WTVN-TV	Columbus, Ohio	Pending	1,250	
WLBW	Miami	6:00	1,000	
WRAL	Raleigh	Pending	1,150	
WNYS	Syracuse	TBA	850	
WOOD-TV	Grand Rapids	Pending	1,300	
KOVR	Sacramento	Pending	800	850 eff. 1/1/63
KVII-TV	Amarillo	Pending	325	
WAFB/WBRZ	Baton Rouge, La.	Pending	450/625	
WPTZ	Plattsburg, N. Y.	Pending	400	
WOC	Davenport	Pending	1,100	
KJEO	Fresno	Pending	575	
WFMY-TV	Greensboro	Pending	900	
WJRT	Flint	Pending	1,000	
Group III				
WBTV/WSOC	Charlotte, N. C.	Pending	1,450/1,350	
WJTV/WLBT	Jackson, Miss.	Pending	600/550	
WITI-TV	Milwaukee	Pending	1,500	
WJAR/WPRO	Providence	Pending	1,550/1,400	
WOKR-TV	Rochester	TBA	800	
XETV	San Diego	Pending	800	
WKTV	Utica	Pending	550	
KALB-TV	Alexandria, La.	Pending	275	
WABI/WLBZ	Bangor, Me.	Pending	400/375	
KRIS/KZTV	Corpus Christi	Pending	350/375	
WDAM-TV	Hattiesburg	Pending	200	
WJXT/WFGA	Jacksonville, Fla.	Pending	850/875	
WSAV/WTOC	Savannah	Pending	350/325	

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APPENDIX G

Answer

[SAME TITLE]

Defendants by their attorneys, Lord, Day & Lord, answering the amended complaint herein, on information and belief:

1. Admit that defendant, American Manufacturers Mutual Insurance Company sued herein as "American Mfrs. Mutual Insurance Co.," is a domestic corporation.

2. Admit that the defendant, American Motorists Insurance Company sued herein as "American Motorists Insurance Co.," is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

3. Admit that the defendant, Federal Mutual Insurance Company sued herein as "Federal Mutual Insurance Co.," is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

4. Admit that the defendant, Lumbermens Mutual Casualty Company sued herein as "Lumbermen's Mutual Casualty Co.," is a foreign corporation organized under the laws of the State of Illinois and is qualified and does transact business in the City, County and State of New York.

5. Admit that the defendants, American Manufacturers Mutual Insurance Company, American Motorists Insurance

Company, Federal Mutual Insurance Company and Lumbermens Mutual Casualty Company, are sometimes referred to as "The Kemper Insurance Companies," and except as so expressly admitted deny each and every allegation of Paragraph SIXTH of the amended complaint.

6. Deny each and every allegation contained in Paragraphs EIGHTH, NINTH, TENTH, FOURTEENTH, FIFTEENTH and SIXTEENTH of the amended complaint.

7. Admit that no part of the sum of $19,818.43 has been paid to the plaintiff, and except as so expressly admitted deny each and every allegation contained in Paragraph ELEVENTH of the amended complaint.

8. Deny each and every allegation in Paragraph TWELFTH of the amended complaint and specifically deny plaintiff's allegation of due performance with respect to:

(a) plaintiff's duty not to promote programs sponsored by competitors of the insurance company defendants (hereinafter "Kemper Companies" or "Kemper") during the "ABC Evening Report" programs delivered by ABC for Kemper or within 10 minutes thereof;

(b) plaintiff's duty to utilize broadcast time sold and delivered to Kemper exclusively for Kemper's purposes;

(c) plaintiff's duty not to damage Kemper's good will;

(d) plaintiff's duty not to do anything which would or might divert the Kemper audience from Kemper or its products;

(e) plaintiff's duty not to do anything during the "ABC Evening Report" programs sponsored by Kemper which would or might result in promoting the products or standing of a competitor of Kemper's;

(f) plaintiff's duty not to do anything during the "ABC Evening Report" programs sponsored by Kemper that would or might damage Kemper's good will and standing with the public; and

(g) plaintiff's duty not to do anything during the "ABC Evening Report" programs sponsored by Kemper which would or might be inconsistent with or contrary to the objective of increasing sales of Kemper's products and of promoting Kemper's good will and standing with the public, all as more fully alleged in the Fourth and Fifth affirmative defenses which are incorporated herein.

9. In answer to Paragraph THIRTEENTH of the amended complaint defendants repeat each and every denial and allegation hereinabove set forth in answer to Paragraph EIGHTH and Paragraph TWELFTH of the amended complaint with the same force and effect as if fully set forth in this paragraph.

AS AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, TO THE SECOND CAUSE OF ACTION, DEFENDANTS ALLEGE ON INFORMATION AND BELIEF:

10. The Kemper Companies are and have been engaged in the insurance business for many years in many areas throughout the United States. Success of Kemper's insurance business throughout the United States depends on

maintaining the good will of its customers and potential customers, and on the public's wareness of the Kemper Companies, their insurance policies, and their services. In order to maintain and increase this good will and public awareness Kemper has found it necessary and desirable to advertise its names, policies, and services throughout the United States by various advertising media, including television.

11. Through its division, The American Broadcasting Company (hereinafter "ABC") plaintiff operates a major television network. It owns several television stations and has affiliation contracts with many other television stations. ABC produces programs for broadcast over its television network.

12. On or about May 4, 1962 Kemper, by its agent Clinton E. Frank, Inc. (hereinafter "Frank"), sent by letter to ABC an order for sponsorship of the program "ABC Evening Report" (hereinafter "Evening Report") by Kemper. ABC did not accept the terms of this order.

13. On or about August 15, 1962, ABC wrote a letter to Frank and in said letter acknowledged receipt of and acknowledged the terms of Kemper's order, as modified on ABC's insistence, for sponsorship of "Evening Report." On August 20, 1962 Kemper agreed that said letter of acknowledgment of ABC correctly embodied the terms of Kemper's order as modified on ABC's insistence. Said letter dated August 15, 1962 is hereafter referred to as the

"ABC acknowledgment of order," a copy of which is annexed to the amended complaint as Exhibit A.

[Remainder of First Defense and Second Through Fifth Defenses Omitted]

* * *

AS AND FOR A SIXTH, SEPARATE AND COMPLETE DEFENSE, TO THE FIRST AND SECOND CAUSES OF ACTION, DEFENDANTS ALLEGE ON INFORMATION AND BELIEF:

51. Defendants repeat and reallege each and every allegation contained in paragraphs 10 through 13 of this answer as though the same were herein fully set forth.

52. The plaintiff conducts business in the several states of the United States, including the State of New York. The plaintiff entered into the contracts and combinations hereinafter described within the said state, and many of the acts pursuant thereto were committed within the state. The plaintiff transacts business within the state in interstate trade and commerce, hereinafter described, and has been conducting and is now conducting such business in part within the said state.

53. Kemper's customers in the insurance business are individuals who are members of the public in certain portions of the United States, and Kemper deals directly with said portions of the public. Advertising through various public media, including television, is an essential part of Kemper's business. The geographical pattern of Kemper's

sales of insurance is such that it is desirable for Kemper to advertise by television in the 95 market areas listed in Exhibit A. The geographical pattern of Kemper's sales of insurance is such that Kemper does not make extensive sales, and did not wish to advertise in the 35 markets listed in Exhibit B.

54. ABC is the owner and licensee of five television stations licensed by the Federal Communications Commission (hereinafter referred to as the FCC). These stations are located in New York, Detroit, Chicago, San Francisco and Los Angeles. At all material times hereinafter mentioned ABC operated one of three major television networks in the United States, which consists of approximately 249 owned or affiliated television stations in the United States (hereinafter sometimes referred to as "ABC's affiliates"). ABC's primarily affiliated stations, including owned stations, are located in the markets listed in Exhibit C. Other United States affiliates of ABC are located in the markets listed in Exhibit D. ABC's gross income from the sale of television and radio time and programs less discounts, rebates and commissions to advertising agencies, was $274,523,295 in 1962. In 1961, it was $254,280,216.

55. Television broadcasting stations and television network systems, including ABC and its affiliates, in the United States are and were at all material times hereafter mentioned engaged in commerce among the several states of the United States and within the State of New York. Each station is an instrumentality through which are transmitted

programs and commercial advertising material across state and national boundaries to television viewers in the United States and foreign countries. Contracts, combinations and conspiracies in restraint of such commerce are specifically brought within the scope of the Federal antitrust laws by Section 313 of the Federal Communications Act of 1934, as amended (47 U. S. C. §313), making the Federal antitrust laws applicable to television broadcasting.

56. The commercial television industry includes four basic elements: (i) audiences, (ii) television stations, (iii) programs and (iv) advertisers.

57. Audience is that segment of the public with which a particular advertiser wishes to communicate in order to promote the sale of its products and to which the advertiser acquires access through the medium of purchasing broadcast time on TV stations. The volume, the quality and the territorial location of the audience reached by an advertiser vary according to the requirements of the particular advertiser and according to the coverage afforded by the particular stations on which the advertiser can purchase station time.

58. Television stations are TV broadcasting units which provide the technical facilities for broadcasting TV programs in various regions of the United States and which provide the advertiser with access to the audience with which it seeks to promote the sale of its products. Each TV station is licensed by the FCC, and is required by

statute and by regulation, as a condition for obtaining and renewing its license, to operate in the public interest.

59. Programs constitute the subject matter, apart from commercials and public service announcements, broadcast on the TV stations. Programs may be live, may be taped, may be filmed, and may cover a myriad of subjects, including sports, news, pictorial fiction, etc., and in fact, may consist of practically anything and everything that may appeal to the public taste. Programs are one of the two major factors that determine audience attraction. The second such major factor is the time of the day at which, and the day of the week on which, the program is televised. The most valuable time of the day is during the evening from and after approximately 6 P. M.

60. Programs are produced by local (i.e., non-network owned) TV stations, by networks, and by independent program producers. Local TV stations produce, for the most part, live programs of a local nature on a modest cost basis for telecast on a local basis. Networks produce live programs, including news programs, and filmed programs to be broadcast by their affiliated stations. Independent program producers include advertising agencies, motion picture companies, and other companies which are engaged in the production of, for the most part, filmed TV programs.

61. Advertisers ultimately provide the entire revenues earned by TV stations and program producers. Advertisers are companies engaged in one or more lines of commerce and dealing either directly or indirectly with the

public. Advertisers fall into three general categories: local, regional and national. National advertisers are those who seek to advertise their products on a national basis; regional advertisers are those who seek to advertise their products on a regional basis; and local advertisers are those who seek to advertise their products on a local basis. Each of these three categories of advertisers buy time on TV stations. TV broadcast time constitutes one of the most important media, if not the most important, for advertising.

62. TV advertising may be purchased on a sponsorship basis, or on a spot announcement basis. In sponsorship advertising the advertiser is identified with the program; the advertising message is broadcast at, or shortly after the beginning, during the course of, and at the end of the program. Spot announcements are advertisements which generally appear between programs not during a program.

63. The sale of TV station broadcast time may take several forms including sales:

(a) By TV stations or their representatives to local advertisers on a spot announcement or sponsored basis.

(b) By TV stations or their representatives to national or regional advertisers on a "spot sale" basis. The sale is usually of a short segment of broadcast time sufficient to permit the telecast of an advertising message at the time of a station break. The sale may be of a broadcast

time segment of a quarter of an hour, or more, sufficient to permit the telecast of a program over that station. Such sales of TV station time, either for spot announcements or for programs to national or regional advertisers, are known as "national spot sales." Such sales are usually subject to cancellation.

(c) By networks to advertisers on a sponsored basis. The sponsored time sale by networks is of broadcast time segments of a quarter of an hour or more to permit the telecast over the network of a sponsored program. Sales of time by networks are known as "network sales." The time sold in a network sale is broadcast time on the network's affiliated stations. For making such a sale the network keeps a substantial share of its affiliated station's time charge rate and remits to its affiliates the balance of its affiliate's time charge received from the advertiser. In order to make such network sales, the network, in most cases, acquires from its affiliates the broadcast time which is the subject of the network sale, or an option therefor.

64. The amount of program and commercial time on television stations throughout the United States available for sale to advertisers, national, regional or local is sharply limited. As of June 30, 1962, there were only approximately 464 VHF (Very High Frequency) and 84 UHF (Ultra High Frequency) commercial TV stations actually on the air, and the entry of additional competitive TV stations into the commercial TV broadcasting field has been practically foreclosed by the limited number of channel assignments that are still available in the VHF band and by the

inability of UHF stations to compete effectively with VHF stations. Thus, as of June 30, 1962 there was an upper limit of 591 commercial VHF TV stations. In many cities throughout the United States all of the available VHF channel assignments have already been allocated to TV stations, and thus additional access to television audiences is not generally possible through VHF frequencies. Approximately 80% of the television sets in use in the United States are not equipped to receive television broadcasts on UHF frequencies. So long as the number of sets equipped to receive television broadcasts on UHF frequencies remains small, there is no incentive to open and operate television stations on channels in the UHF band, and so long as the number of UHF TV stations remains small in comparison with the number of VHF band stations, there is little incentive for the public to purchase UHF sets or UHF adapters for VHF sets. The practical consequence is that entry of new TV stations or networks into the commercial TV broadcasting field in those areas which include the vast majority of the audience public in the United States has been foreclosed or severely restricted and that advertisers are forced to deal with the limited number of existing stations and networks for broadcast time in order to reach the desired audience.

65. There are only three major TV networks operating in the United States. ABC operates one of these three networks. Over 90% of the approximately 548 commercial TV stations in the United States are affiliated with at least one of the three major networks.

Appendix G

66. Networks function in several capacities. They produce and sell or license programs or sponsorship rights to programs to advertisers. They purchase or acquire TV time from affiliated TV stations, including their owned stations. They sell to advertisers TV time on stations owned by them and on stations affiliated with them. They schedule programs for clearance through their affiliated stations, and in the more valuable periods of the broadcast day they determine, as a practical matter, the program content of the programs cleared through their affiliated stations.

67. The principal source of a network's earnings is the sale of the broadcast time of its affiliates. The volume of a network's revenues depends on, among other things, the sale of broadcast time of its affiliates to advertisers through the network and on the number of affiliates on which broadcast time is sold to the advertiser through the network. A network's advertising revenues also depend on the network's audience rating and this depends in part on the number of affiliates whose time is sold through the network. The greater the number of the network's affiliates which clear network programs, the higher will be the network's audience rating and the greater its revenues from advertisers for time charges for its affiliates' broadcast time. In short, acquisition of, control over, and sale of the broadcast time of stations affiliated with a network is of direct and primary concern to the network.

68. Networks compete for the acquisition of and control over the broadcast time of their affiliates with national, re-

gional, and local advertisers who seek to acquire the broadcast time of stations affiliated with the networks directly from those stations rather than through the network. Broadcast time of network affiliates sold directly to advertisers is time lost to the network, and the revenues from the sale of that time is advertising revenue lost to the network.

69. In order to acquire, control and dominate the broadcast time of its affiliates, and in order to foreclose competitors from acquisition of and access to that time, ABC has imposed certain tie-in arrangements between it and its affiliated stations and certain tie-in arrangements between it and its advertisers. These tie-in arrangements are accomplished as follows:

(a) Sales of unique programs controlled by ABC as owner or licensee and sales of the broadcast time on ABC affiliates in market areas desired by advertisers are conditioned by ABC on sponsorship by the advertisers of the desired program over, and the sale of broadcast time on, those ABC affiliates which are located in market areas not desired by the advertiser.

(b) Availability of programs controlled by ABC as owner, licensee, or otherwise, and desired by an ABC affiliate is conditioned by ABC on clearance by the affiliate of other programs and on acceptance by the affiliate of the advertiser as sponsor furnished by the network. Clearance by the affiliate of programs furnished by the network forecloses the affiliate from selling the advertising time con-

nected with the program directly to advertisers without ABC's authorization.

70. The aforesaid tie-in arrangements imposed by ABC on its advertisers and on its affiliates have resulted in contracts and combinations between ABC, its advertisers, and its affiliates which:

(a) Substantially restrain, restrict and limit competition in the acquisition, purchase and sale of the broadcast time on affiliates of ABC.

(b) Foreclose and limit advertisers from access to the broadcast time of ABC affiliates.

(c) Foreclose and limit ABC affiliates from access to advertisers and owners and licensees of programs.

(d) Divert national advertising revenues through the networks and away from the network's affiliates.

(e) Increase ABC control over and dominance of the acquisition and sale of the broadcast time of its affiliates.

(f) Coerce ABC advertisers into buying broadcast time on affiliates of ABC in unwanted market areas.

(g) Deprive the small advertisers of access to the TV audience in the more valuable TV broadcast time periods.

(h) Enable ABC to dominate and control a very substantial segment of the more valuable broadcast period of ABC affiliates.

71. In 1962 and at all material times herein, ABC was producing a live news program of approximately one-quar-

ter hour duration entitled "Evening Report." This program was produced and edited by ABC's news department, and featured Ron Cochran. It was broadcast over ABC's network throughout the United States fives days per week on a live or delayed basis between the hours of 5:30 P. M. and 7:30 P. M. local time. The program covered events of national and international significance, and featured on-the-spot reports with numerous interviews with and reports from eyewitnesses. The program was unique.

72. In 1962, ABC had cleared "Evening Report" with certain of its affiliates under the arrangements described in paragraph 69 above which foreclosed ABC affiliates from selling the broadcast time for "Evening Report" directly to advertisers; required said affiliates to accept the sponsor for "Evening Report" furnished by ABC; and required said affiliates to accept from ABC substantially less than 50% of the affiliates' published time charges for the broadcast of "Evening Report" over that station.

73. In early 1962, Kemper decided (a) to advertise over TV stations located in the 95 market areas listed in Exhibit A and (b) that sponsorship of a general interest program such as a live news program would be best suited to meet Kemper's advertising needs.

74. By reason of the facts alleged in paragraphs 64, 65, 69 and 70, Kemper was obliged to deal exclusively with ABC for the purchase of sponsorship rights to "Evening Report" and for the purchase of broadcast time on those affiliates of ABC over which Kemper desired to sponsor "Evening Report".

Appendix G

75. ABC refused to sell to Kemper sponsorship of "Evening Report" and refused to sell to Kemper time for broadcast of "Evening Report" on a sponsored basis on the 95 stations affiliated with ABC located in the market areas in which Kemper wished to advertise except on the terms hereafter alleged. ABC conditioned the sale of sponsorship of "Evening Report" to Kemper and conditioned the sale of time for the broadcast of "Evening Report" on a sponsored basis on its affiliated stations serving the 95 market areas desired by Kemper, on Kemper's purchase of time to broadcast "Evening Report" on a sponsored basis on 35 additional stations affiliated with ABC and serving market areas in which Kemper did not wish to advertise. The tie-in sale of the program "Evening Report," and the tie-in sale of the time to broadcast the said program on a sponsored basis on the desired 95 ABC affiliates, with and to the sale of time to broadcast "Evening Report" on a sponsored basis in the 35 undesired market areas, was effected by ABC's informing Kemper that it would charge a rate for the broadcast time on the 95 desired stations that far exceeded the rate for the broadcast time on the total of 130 stations which included both the desired 95 stations and the undesired 35 stations. The excess of the rate for the 95 affiliates over the rate for those 95 affiliates, when tied to the undesired 35 affiliates, was unreasonable, excessive, unrelated to any cost differential to ABC, and had the effect of conditioning the sale of sponsorship rights and broadcast time on the desired 95 stations upon the sale of broadcast time on the undesired 35 stations. Such conditioning was imposed by ABC for

the purpose of achieving the restraints alleged in paragraph 70.

76. By reason of the tie-in of the sale of "Evening Report" to the sale of time on the undesired 35 ABC affiliates, Kemper, in order to buy sponsorship of "Evening Report" and time on the 95 desired ABC affiliates, was coerced into and in fact did buy time on 35 ABC affiliates located in market areas undesired by Kemper.

77. ABC's action in tying the sale of "Evening Report" and the sale of time on 95 ABC affiliates to the sale of time on 35 undesired ABC affiliates for broadcast of "Evening Report" on a sponsored basis was for the purpose, and had the effect, alleged in paragraph 70 above.

78. ABC has attempted to enforce the tie-in restraints heretofore alleged by requiring Kemper to agree to the terms of the ABC acknowledgment of order, and by attempting to enforce the ABC acknowledgment of order as a contract.

79. Said ABC acknowledgment of order restrains interstate trade and commerce in the sale of television station time, or would restrain such trade and commerce if ABC is able to enforce its provisions. By reason of such restraints said ABC acknowledgment of order violates Section 1 of the Sherman Act, 15 U. S. C. §1 and is unenforceable.

80. On January 4, 1963 Kemper informed ABC that it would not sponsor any further "Evening Report" pro-

grams on the ABC network. On January 9, 1963, ABC instituted this suit against Kemper and Kemper's agent, Clinton E. Frank, Inc.

81. This suit was instituted by ABC for the purpose of giving effect to the unlawful contracts and combinations described in paragraphs 69, 70 and 75 above of this answer, and for the purpose of and furtherance of the objectives enumerated in paragraphs 69 and 70 above. The suit seeks damages for breach of an alleged obligation on Kemper's part to sponsor "Evening Report" on the 130 ABC affiliates in the market areas listed in Exhibits A and B, which included the 35 ABC affiliates located in undesired market areas listed in Exhibit B. The said alleged obligation was obtained by coercion from Kemper in the manner alleged in paragraphs 69 and 70 above, and for the purpose and effect alleged in paragraphs 69 and 70 above. Performance of said alleged contract would have limited, restrained, and restricted competition in the acquisition, purchase and sale of the broadcast time of ABC affiliates in the manner and respect outlined in paragraph 70 above.

82. If ABC prevails in this suit, this court will have sanctioned and enforced the restraints and violations heretofore alleged in paragraphs 70 and 79.

83. As a result of the foregoing, defendants are under no liability to ABC as alleged in the First and Second Causes of Action in the amended complaint.

* * *

Appendix G

[Seventh Defense, Partial Defenses, and First and Second Counterclaims Omitted]

* * *

WHEREFORE, the defendants demand judgment:

(1) That the complaint be dismissed; and

(2) That defendant Lumbermens Mutual Casualty Company have judgment on its first counterclaim against plaintiff for the sum of $14,081.95, with interest thereon; and

(3) That defendant American Motorists Insurance Company have judgment on its first counterclaim against plaintiff for the sum of $2,485.05, with interest thereon; and

(4) That defendant Lumbermens Mutual Casualty Company have judgment on its second counterclaim against plaintiff for the sum of $59,722.64, with interest thereon; and

(5) That defendant American Motorists Insurance Company have judgment on its second counterclaim against plaintiff for the sum of $10,539.29 with interest thereon; and

(6) That defendants Kemper and Frank have judgment against plaintiff for the costs and disbursements of this action; and

Appendix G

(7) That defendants Kemper and Frank be awarded such other and further relief, including judgment for such other and further damages as it may be found to have suffered, as to this Court may seem just and proper.

LORD, DAY & LORD
Attorneys for Defendants
Office & P. O. Address
25 Broadway
New York 4, New York

(Verified May 23, 1963 by John W. Castles, 3d and by John N. Blackman)

Appendix G

"Exhibit A" Appended to Answer

95 Markets in Which Kemper Desired to Advertise Through Television

Altoona; Albany, N. Y.*; Asheville; Atlanta*; Baltimore*; Binghampton*; Boston*; Huntington, W. Va.; Chattanooga; Cincinnati*; Detroit*; Greenville, Wash.; Holyoke; Indianapolis*; Knoxville; Lynchburg; Manchester; Mt. Washington*; New Haven*; New York*; Norfolk; Orlando; Philadelphia*; Pittsburgh*; Richmond*; St. Petersburg; Scranton; Toledo; Washington, D. C.*; West Palm Beach; York; Beaumont; Birmingham*; Chicago*; Dallas*; Decatur, Ill.; Green Bay; Houston*; Kansas City*; Little Rock*; Lake Charles, La.; Louisville; Madison; Memphis; Minneapolis*; Mobile; Nashville; New Orleans*; Oklahoma City*; Omaha; Peoria; Rockford; St. Louis*; San Antonio; Shreveport; South Bend; Tulsa*; Wichita; Wichita Falls; Denver; Phoenix; Bakersfield; Los Angeles*; Portland*; San Francisco*; Seattle*; Spokane; Buffalo*; Cleveland*; Columbus, Ohio*; Miami*; Raleigh*; Syracuse*; Grand Rapids; Sacramento; Amarillo; Baton Rouge, La.; Plattsburgh, N. Y.; Davenport; Fresno; Greensboro; Flint; Charlotte, N. C.*; Jackson, Miss.*; Milwaukee*; Providence*; Rochester*; San Diego; Utica; Alexandria, La.; Bangor, Me.; Corpus Christi; Hattiesburg; Jacksonville, Fla.; and Savannah.

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* Indicates keymarkets for Kemper Insurance.

Appendix G

"Exhibit B" Appended to Answer

35 Markets in Which Kemper did not Desire to Advertise Through Television

Akron, Ohio; Anderson; Augusta, Ga.; Charleston, S. C.; Columbia, S. C.; Erie; Fairmont; Fort Wayne; Harrisburg, Pa.; Lebanon; Lexington; Waterbury; Youngstown; Ada; Austin, Minn.; Cedar Rapids; Des Moines; Evansville; Fargo; Grand Forks; Harrisburg, Ill.; Hays, Kansas; Hayes Center, Nebr.; Kearney; Pembina; Monahans; Albuquerque; Colorado Springs; Salt Lake City; Eugene; Klamath Falls; San Jose; Yakima; Richland; and Salina.

"Exhibit C" Appended to Answer

Markets Served by ABC's Primary Affiliates & Owned Stations

Ada, Okla.; Akron, Ohio; Albany-Schenectady-Troy, N. Y.; Albuquerque, N. M.; Amarillo, Tex.; Anderson, S. C.; Asheville, N. C.—Greenville, Spartanburg, S. C.; Atlanta, Ga.; Austin-Rochester, Minn.—Mason City, Ia.; Bakersfield, Calif.; Baltimore, Md.; Beaumont, Tex.; Binghamton, N. Y.; Birmingham, Ala.; Selma, Ala.; Biloxi, Miss.; Boston, Mass.; Buffalo, N. Y.; Cedar Rapids-Waterloo, Ia.; Charleston, S. C.; Chattanooga, Tenn.; Chicago, Ill.; Cincinnati, Ohio; Cleveland, Ohio; Colorado Springs, Colo.; Columbia, S. C.; Columbus, Ga.; Columbus, Ohio; Dallas-Ft. Worth, Tex.; Decatur, Ill.; Denver, Colo.; Des Moines, Iowa; Detroit, Mich.; El Paso, Tex.; Erie, Pa.; Eugene, Ore.; Evansville, Ind.; Fairmont, W. Va.; Fargo, N. D.;

Appendix G

Flint-Saginaw-Bay City-Lansing, Mich.; Ft. Wayne, Ind; Fresno, Calif.; Grand Forks, N. D.; Pembina, N. D.; Grand Rapids, Mich.; Green Bay, Wis.; Harrisburg, Ill.; Poplar Bluff, Mo.; Harrisburg, Pa.; Honolulu, Hawaii; Hilo, Hawaii; Waliuku, Maui, Hawaii; Houston, Tex.; Huntington-Charleston, W. Va.; Huntsville, Ala.; Indianapolis, Ind.; Kansas City, Mo.; Kearney, Neb.; Hayes Center, Neb.; Klamath Falls, Ore.; Knoxville, Tenn.; Lafayette, La.; Las Vegas, Nev.; Lebanon, Pa.; Lexington, Ky.; Little Rock, Ark.; Los Angeles, Calif.; Louisville, Ky.; Lynchburg-Roanoke, Va.; Madison, Wis.; Memphis, Tenn.; Miami, Fla.; Milwaukee, Wis.; Minneapolis-St. Paul, Minn.; Mobile, Ala.-Pensacola, Fla.; Monahans, Tex.; Alpine, Tex.; Montgomery, Ala.; Nashville, Tenn.; New Haven, Conn.; New Orleans, La.; New York, N. Y.; Norfolk, Va.; Oklahoma City-Enid, Okla.; Omaha, Neb.; Orlando, Fla.; Peoria, Ill.; Philadelphia, Pa.; Phoenix, Ariz.; Pittsburgh, Pa.; Portland, Me.-Mt. Washington, N. H.; Portland, Ore.; Providence-New Bedford, R. I.; Raleigh, N. C.; Redding, Calif.; Eureka, Calif.; Richmond, Va.; Rochester, N. Y.; Rockford, Ill.; Sacramento-Stockton, Calif.; St. Louis, Mo.; Salina, Kan.; Salt Lake City, Utah; San Antonio, Tex.; San Diego (Tiajuana, Mex.), San Francisco, Calif.; San Jose, Calif.; Santa Barbara, Calif.; Scranton-Wilkes-Barre, Pa.; Seattle, Wash.; Shreveport, La.; South Bend-Elkhart, Ind.; Spokane, Wash.; Springfield-Holyoke, Mass.; Syracuse, N. Y.; Tampa-St. Petersburg, Fla.; Toledo, O.; Tucson, Ariz.; Tulsa, Okla.; Washington, D. C.; Waterbury, Conn.; West Palm Beach, Fla.; Wichita, Kan.; Wichita Falls, Tex.-Lawton, Okla.; Yakima, Wash.; Richmond, Wash.; and Youngstown, Ohio.

Appendix G

"Exhibit D" Appended to Answer

U. S. Markets Served by ABC Affiliates Other Than Primary Affiliates and Owned Stations

Aberdeen, S. D.; Albany, Ga.; Alexandria, Minn.; Altoona, Pa.; Anchorage, Alaska; Augusta, Ga.; Austin, Tex.; Bangor, Me.; Baton Rouge, La.; Big Spring, Tex.; Billings, Mont.; Bismarck, N. D.; Bluefield, W. Va.; Boise, Idaho; Bristol, Va.-Johnson City, Tenn.; Butte, Mont.; Cadillac, Mich.; Sault Ste. Marie; Casper, Wyo.; Charlotte, N. C.; Cheyenne, Wyo.; Scottsbluff, Neb.; Clovis, N. M.; Columbia, Mo.; Columbus, Miss.; Corpus Christi, Tex.; Davenport, Ia.; Dayton, Ohio; Dothan, Ala.; Duluth, Minn.-Superior, Wis.; Eau Claire, Wis.; Eldorado, Ark.; Fairbanks, Alaska; Florence, S. C.; Ft. Myers, Fla.; Ft. Smith, Ark.; Grand Junction, Colo.; Great Falls, Mont.; Greensboro, N. C.; Greensville, N. C.; Greenwood, Miss.; Harlingen, Tex.; Harrisburg, Va.; Hattiesburg, Miss.; Idaho Falls, Idaho; Jackson, Michigan; Jackson, Miss.; Jackson, Tenn.; Jacksonville, Fla.; Jefferson City, Mo.; Sedalia, Mo.; Johnson City, Tenn.-Bristol, Va.; Johnstown Pa.; Joplin, Mo.; Juneau, Alaska; La Crosse, Wis.; Laredo, Tex.; Lima, Ohio; Lubbock, Tex.; Lufkin, Tex.; Macon, Ga.; Manchester, N. H.; Marquette, Mich.; Medford, Ore.; Meridian, Miss.; Midland, Tex.; Minot, N. D.; Missoula, Mont.; Monroe, La.; Muncie, Ind.; Panama City, Fla.; Parkersburg, W. Va.; Pittsburgh, Kan.; Plattsburg, N. Y.-Burlington, Vt.; Presque Isle, Me.; Quincy, Ill.-Hannibal, Mo.; Quincy, Ill.; Rapid City, S. D.; Reno, Nev.; Riverton, Wyo.; Rock Island, Ill.; Roswell, N. M.; St. Thomas, V. I.; Salisbury, Md.;

Appendix G

San Angelo, Tex.; Savannah, Ga.; Sioux City, Iowa; Sioux Falls, S. D.; Springfield, Mo.; Steubenville, Ohio; Sweetwater-Abilene, Tex.; Tallahassee, Fla.-Thomasville, Ga.; Terre Haute, Ind.; Topeka, Kans.; Traverse City, Mich.; Cheboygan, Mich.; Twin Falls, Idaho; Tyler, Tex.; Utica, N. Y.; Waco, Tex.; Bryan, Tex.; Watertown-Carthage, N. Y.; Wausau, Wis.; Weslaco, Tex.; Wheeling, W. Va.; Wilmington, N. C.; Winston-Salem, N. C.; York, Pa.; and Zanesville, Ohio.

APPENDIX H

Notice of Motion to Dismiss Defense of Illegality Under the Sherman Act (Sixth Affirmative Defense)

[Same Title]

Sirs:

Please Take Notice that upon the complaint and answer herein and upon the affidavit of Donal L. Flynn, with the exhibits annexed thereto, verified the 31st day of May, 1963 and the affidavit of James C. Hagerty, verified the 28th day of May, 1963, the undersigned will move this Court at Special Term, Part I, of the Supreme Court, to be held in and for the County of New York, at the New York County Courthouse, located at Pearl and Centre Streets, in the Borough of Manhattan, City and State of New York, on the 7th day of June, 1963, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order:

1. Striking out the first, second and third affirmative defenses to the second cause of action, the fourth, fifth and sixth affirmative defenses to the first and second causes of action and the first and second partial defenses to the second cause of action pursuant to Rule 109 of the Rules of Civil Practice on the ground that the said defenses are insufficient as a matter of law.

2. Dismissing the first and second counterclaims pursuant to Rule 109 of the Rules of Civil Practice on the ground that the said counterclaims do not state facts sufficient to constitute a cause of action.

3. Striking out the answer herein insofar as it relates to the defenses of defendants' American Mfrs. Mutual Insurance Co., American Motorists Insurance Co., Federal Mutual Insurance Co. and Lumbermen's Mutual Casulaty Co., and directing the entry of summary judgment for the plaintiff against said defendants upon the causes of action set forth in the complaint and directing that the matter be referred to an Official Referee of this Court for an assessment of the amount and the extent of the damages, pursuant to Rule 113 of the Rules of Civil Practice on the ground that there is no defense to said causes of action.

4. Striking out paragraphs 8(a), (b), (c), (d), (e), (f) and (g), paragraphs 12, 13, 14, 15, 17, 18, 19, 21, 22, 23, paragraphs 25 to 50, inclusive, paragraphs 52 to 83, inclusive, paragraphs 86 to 89, inclusive, and paragraphs 91 to 101, inclusive, of the defendants' answer, pursuant to Rule 103 of the Rules of Civil Practice on the ground that the matters sought to be stricken are sham, frivolous, irrelevant, unnecessary and impertinent, and prejudice and delay the fair trial of this action.

Appendix H

And for such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, New York
May 31, 1963

Yours, etc.

HAWKINS, DELAFIELD & WOOD
Attorneys for the Plaintiff
Office and P. O. Address
67 Wall Street
New York 5, New York

To: LORD, DAY & LORD, Esqs.
Attorneys for Defendants
Office and P. O. Address
25 Broadway
New York 4, New York

APPENDIX I

Sherman Act §1, 26 Stat. 209 as Amended, 50 Stat. 693, 69 Stat. 282; 15 U. S. C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who

shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX J

Supremacy Clause—The Constitution of the United States, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.